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In Pursuit of NEPA's Promise: The Role of Executive Oversight in the Implementation of Environmental Policy

WILLIAM L. ANDREEN*

INTRODUCTION

The twentieth century has witnessed a fundamental change in the ability of society to alter the shape of the natural environment. Through the use of modern technology, we can dam vast rivers, tap the power of the atom, and, literally, make the desert bloom. In the United States, the role of the federal government has loomed large in transforming the environment through the application of technology. The federal government has built, funded, or approved innumerable projects designed to improve the economic well-being of the nation. Until 1970, however, these projects were often undertaken with little or no consideration of their possible detrimental effects upon the environment.¹

Frustrated by the insensitivity of many federal agencies to the environmental consequences of their actions, Congress enacted the National Environmental Policy Act of 1969 (NEPA).² The text of NEPA is remarkably brief, and its language extremely general. Nevertheless, NEPA represented an unprecedented attempt to protect the human environment by broadly

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1. See generally L. CALDWELL, *SCIENCE AND THE NATIONAL ENVIRONMENTAL POLICY ACT: REDIRECTING POLICY THROUGH PROCEDURAL REFORM* 6-9, 41-46 (1982) (recounting how federal agencies—especially those concerned with natural resources, land use, and transportation—had reshaped the nation's landscape during the two decades following the Second World War); Tarlock, *Balancing Environmental Considerations and Energy Demands: A Comment on Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 47 IND. L.J. 645, 658 (1972) (stating that mission-oriented federal agencies had tended to overemphasize the developmental benefits of their particular programs to the detriment of the environment).

2. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4347 (1982)) [hereinafter NEPA]. One can say, without exaggeration, that the "modern era" of environmental law began with the signing of NEPA by President Nixon on New Year's Day 1970. See J. BONINE & T. MCGARITY, *THE LAW OF ENVIRONMENTAL PROTECTION* 2 (1984); see also COUNCIL ON ENVTL. QUALITY, *TENTH ANN. REP.* 1, 15 (1979) (stating that the "environmental decade" of the 1970s began with the enactment of NEPA).

injecting environmental concerns into the calculus of federal decisionmaking.

The Act begins with an elaborate declaration of national policy with respect to the environment.³ Congress prescribed, in short, that "it is the continuing policy of the Federal Government . . . to use all practicable means . . . to create and maintain conditions under which man and nature can exist in productive harmony . . ."⁴ Congress recognized, however, that a lofty pronouncement of national policy, no matter how eloquent, would have little impact upon the priorities of mission-oriented agencies without additional action-forcing features.⁵ Consequently, NEPA sets forth a number of instructions to the federal government, all of which are designed to assure the implementation of this policy in federal planning and decision-making.

These action-forcing instructions both authorize and mandate federal agencies to consider environmental matters just as they would any other matter within their programmatic authority.⁶ Congress accomplished this by requiring in section 102 that the federal government comply "to the fullest extent possible" with a new substantive mandate and an innovative procedural device.⁷ First, Congress directed all federal agencies to apply their policies and the laws and regulations they administer in accordance with the broad national policy enunciated by NEPA.⁸ Thus, the Act's policy is not merely hortatory; it is intended to be implemented.⁹ In addition, the

3. See F. GRAD, *ENVIRONMENTAL LAW* 1037 (3d ed. 1985).

4. NEPA § 101(a), 42 U.S.C. § 4331(a) (1982). Congress expanded upon this primary policy in § 101(b) where it set forth six specific objectives for this legislation. Among these objectives are the assurance of safe and healthful surroundings, *id.* § 101(b)(2), 42 U.S.C. § 4331(b)(2); the attainment of a wide range of "beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences," *id.* § 101(b)(3), 42 U.S.C. § 4331(b)(3); and the preservation of important historic and natural resources, *id.* § 101(b)(4), 42 U.S.C. § 4331(b)(4).

5. As Professor Lynton Caldwell so aptly wrote: "Exhortation has seldom been an effective instrument of political or moral reform." L. CALDWELL, *supra* note 1, at 51.

6. See *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1112-13 (D.C. Cir. 1971).

7. NEPA § 102, 42 U.S.C. § 4332 (1982). The purpose of the phrase "to the fullest extent possible" was to make clear that every federal agency must comply with the directives of § 102 unless some existing law either prohibits compliance or renders full compliance impossible. H.R. CONF. REP. NO. 765, 91st Cong., 1st Sess. 9 (1969) [hereinafter *CONFERENCE REPORT ON NEPA*]. See also *Calvert Cliffs' Coordinating Comm.*, 449 F.2d at 1114 (declaring that these words set a "high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts").

8. NEPA § 102(1), 42 U.S.C. § 4332(1) (1982). This new mandate, of course, did not displace the preexisting responsibilities possessed by federal agencies; rather, it was meant to supplement those responsibilities. *Id.* § 105, 42 U.S.C. § 4335. See also *id.* § 102, 42 U.S.C. § 4332 (tempering this environmental directive with the phrase "to the fullest extent possible").

9. Congress was keenly aware that many agencies had argued that they lacked the statutory authority to concern themselves with the harmful environmental effects of their actions. See S. REP. NO. 296, 91st Cong., 1st Sess. 14 (1969) [hereinafter *SENATE REPORT ON NEPA*]. NEPA, consequently, was consciously crafted to expand the mandates of federal agencies to

Act contains a procedural mechanism designed to translate its policy into action. All federal agencies are required to prepare "a detailed statement" on proposals for major federal actions "significantly affecting the quality of the human environment."¹⁰ Such an environmental impact statement (EIS) must address the environmental ramifications of the proposed federal action and any alternatives to that action.¹¹ The EIS requirement has become the linchpin of the NEPA process.¹² Through their preparation, federal agencies are expected to examine the harmful consequences that their major decisions may have on the quality of the environment. Moreover, the EIS serves as evidence of whether an agency has actually taken a hard look at the environmental implications of a proposed action during the planning process.¹³ Thus, the EIS is the procedural device that seeks to ensure that the ambitious goals of NEPA do not wither at the hands of administrative hostility or passivity.

The effectiveness of this procedure is enhanced by the creation of several institutional arrangements which serve to reinforce the desired reorientation in federal decisionmaking. NEPA created a Council on Environmental Quality (CEQ) in the Executive Office of the President to oversee the implementation of the Act.¹⁴ Among its functions is the duty to review federal activities in light of the national policy enunciated in NEPA.¹⁵ NEPA also created another external check upon the rather natural inclination of federal agencies to elevate their primary missions above any environmental considerations.¹⁶ The Act requires that agencies preparing an EIS must "obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved."¹⁷

encompass environmental values. *See id.* at 19-20 ("To remedy present shortcomings in the legislative foundation of existing programs, and to establish action-forcing procedures which will help to insure that the policies enunciated in section 101 are implemented, section 102 authorizes and directs that the existing body of Federal law, regulation, and policy be interpreted and administered to the fullest extent possible in accordance with the policies set forth in this act."). In short, NEPA placed "an environmental overlay" upon the specific statutory missions of the federal government. D. MANDELKER, *NEPA LAW AND LITIGATION* § 1:01, at 2 (1984).

10. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1982).

11. *Id.* The statute provides that the EIS must contain a discussion of the following five points: the proposal's impact upon the environment, any unavoidable adverse impacts, alternatives to the proposal, the trade-off between short-term uses of the environment and long-term productivity, and any irretrievable commitments of resources necessitated by the implementation of the proposal. *Id.*

12. *See, e.g.,* D. MANDELKER, *supra* note 9, § 1:01, at 2.

13. *See Calvert Cliffs' Coordinating Comm.*, 449 F.2d at 1114.

14. NEPA § 202, 42 U.S.C. § 4342 (1982).

15. *Id.* § 204(3), 42 U.S.C. § 4344(3) (1982). *See also* H.R. REP. No. 378, 91st Cong., 1st Sess. 9-10 (1969) (stating that one responsibility of CEQ is to maintain "a constant review" of federal programs to determine whether they are consistent with NEPA) [hereinafter *HOUSE REPORT ON NEPA*].

16. *See* 115 CONG. REC. 29,053 (1969) (remarks of Sen. Muskie).

17. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1982). These comments together with the EIS must be made available to CEQ and the public. *Id.*

Not long after the enactment of NEPA, Congress acted to amplify executive branch oversight. The Clean Air Act Amendments of 1970¹⁸ specifically order the United States Environmental Protection Agency (EPA) to review and comment upon the environmental implications of any major federal action subject to the required preparation of an EIS.¹⁹ In addition, EPA is directed "to raise the red flag" in the event an action is found to pose an unacceptable risk of environmental harm.²⁰ Whenever EPA finds that any such action "is unsatisfactory from the standpoint of public health or welfare or environmental quality," the agency must refer the matter to CEQ.²¹ This supervisory authority is thus quite expansive. It extends beyond the merits of a particular impact statement to encompass the environmental merits of the project itself.

The task of ensuring the implementation of NEPA, however, has not been left entirely in the hands of the executive branch. Although NEPA does not expressly address the role of judicial review, the federal courts have become the prime enforcer of the impact statement process.²² This came about for a number of reasons. During the early years of NEPA, citizens presented the federal courts with many cases which revealed grudging, half-hearted compliance by some federal agencies.²³ The courts reacted by strictly enforcing the procedural aspects of NEPA²⁴ in order "to see that important legislative purposes . . . are not lost or misdirected in the vast hallways of the federal bureaucracy."²⁵ Furthermore, the vague language of NEPA gave the federal courts the opportunity to create an expansive

18. Pub. L. No. 91-604, 84 Stat. 1676 (1970) (codified as amended at 42 U.S.C. §§ 7401-7642 (1982)) [hereinafter Clean Air Act].

19. Clean Air Act § 309(a), 42 U.S.C. § 7609(a) (1982).

20. See *Nomination of William D. Ruckelshaus: Hearings Before the Senate Comm. on Public Works*, 91st Cong., 2d Sess. 44 (1970) [hereinafter *Ruckelshaus Confirmation Hearings*]. The sparse legislative history on § 309 is greatly amplified by discussions concerning it that Senator Muskie had with William Ruckelshaus during the latter's confirmation hearings as the Administrator of EPA. These discussions took place prior to the final passage of the Clean Air Act Amendments of 1970 and were specifically alluded to by Senator Muskie during the Senate consideration of the conference report on the 1970 amendments. See 116 CONG. REC. 42,386 (1970), reprinted in 1 LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS 1970, at 136 (1974) [hereinafter LEGISLATIVE HISTORY 1970].

21. Clean Air Act § 309(b), 42 U.S.C. § 7609(b) (1982).

22. See F. ANDERSON, NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT 15 (1973) [hereinafter NEPA IN THE COURTS]; D. MANDELKER, *supra* note 9, §§ 1:05, at 8-11, 3:01, at 1; E. REHBINDER & R. STEWART, ENVIRONMENTAL PROTECTION POLICY 134 (1985).

23. See Comment, *The National Environmental Policy Act: How It Is Working, How It Should Work*, 4 ENVTL. L. REP. (ENVTL. L. INST.) 10,003 (1974).

24. See R. LIROFF, A NATIONAL POLICY FOR THE ENVIRONMENT: NEPA AND ITS AFTERMATH 186-87 (1976); Anderson, *The National Environmental Policy Act*, in FEDERAL ENVIRONMENTAL LAW 238, 412 (E. Dolgin & T. Guilbert eds. 1974); Goldsmith & Banks, *Environmental Values: Institutional Responsibility and the Supreme Court*, 7 HARV. ENVTL. L. REV. 1, 4 (1983); Comment *supra* note 23, at 10,003.

25. *Calvert Cliffs' Coordinating Comm.*, 449 F.2d at 1111.

common law that demands the rigorous exploration of environmental issues during the impact statement process.²⁶

Judicial scrutiny, however, does not extend to the substantive merits of an agency's decision. Assuming, therefore, that an agency has examined the environmental consequences of its proposed action fully, the courts will not second-guess an agency's eventual decision even if the decision is to proceed with an environmentally unsatisfactory project.²⁷ This judicial reluctance to engage in substantive review of federal decisionmaking appears appropriate since NEPA's general statement of policy provides precious little "law" to apply.²⁸ Moreover, the resolution of any conflict among various national policies—only one of which is presented by NEPA—is not truly amenable to judicial review. Nevertheless, NEPA was meant to change the manner in which mission-oriented federal agencies behave. And, despite all of the resources devoted to the EIS process itself,²⁹ the EIS remains only a means to achieve that desideratum.³⁰

If the focus of NEPA compliance is confined to the impact statement process itself, the ultimate goal of the Act—namely, better decisions—could atrophy. The EIS process could devolve into a paperwork production process having little substantive effect. Somehow the information produced by an EIS must be used and relied upon in the ultimate decision produced by the agency. Just as certainly, however, the federal courts will not, perhaps should not, supervise that complicated balancing process. The only branch of government, therefore, that has both the ability and the authority to consistently oversee the substantive implementation of NEPA is the executive.³¹

26. See *Kleppe v. Sierra Club*, 427 U.S. 390, 421 (1976) (Marshall, J., concurring in part and dissenting in part); R. LIROFF, *supra* note 24, at 187; D. MANDELKER, *supra* note 9, § 1:05; E. REHBINDER & R. STEWART, *supra* note 22, at 54, 135; Goldsmith & Banks, *supra* note 24, at 3-4.

27. See *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980) (per curiam); see also *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978) (stating that NEPA is designed "to insure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals or of this Court would have reached . . .").

28. The Administrative Procedure Act provides that agency decisions are unreviewable to the extent that the action "is committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (1982). According to the Supreme Court, this precludes review "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (quoting *S. REP. NO. 752*, 79th Cong., 1st Sess. 26 (1945)).

29. See, e.g., J. BATTLE, *ENVIRONMENTAL DECISIONMAKING AND NEPA* 114 (1986).

30. See L. CALDWELL, *supra* note 1, at 6.

31. Congress, of course, has the power to monitor NEPA compliance through oversight and appropriation hearings. While congressional pressure can be considerable in specific instances, Congress clearly lacks the wherewithal to give regular and detailed attention to the wide range of executive actions subject to the requirements of NEPA.

Executive branch oversight, however, has generally been limited to the impact statement phase of the NEPA process. Although EPA and commenting federal agencies may refer proposals involving possible unsatisfactory environmental effects to CEQ,³² such referrals must be made before a federal agency actually makes its substantive decision.³³ Consequently, all referrals involve the merits or demerits of an impact statement and the proposal as described in it. The missing link is that the agency which prepared the EIS may or may not actually use that document in framing its ultimate decision, and the merits of that ultimate decision are shielded from referral.³⁴ Having "considered" the environmental impacts of the proposal, therefore, an agency can do just about anything it chooses.

The problem of the missing link between what is learned in the NEPA process and how this information can better inform federal decisionmaking did attract CEQ's attention when it promulgated regulations implementing NEPA.³⁵ Those regulations require a decisionmaker to consider the alternatives presented in the EIS.³⁶ Furthermore, a decisionmaker must prepare a public record of decision which states, among other things, whether all practical measures for avoiding or minimizing environmental harm have been adopted, and if not, why not.³⁷ Although designed to lead an agency to water, the decisional process which CEQ imposed upon federal decisionmaking amounts to little more than a rhetorical admonition. The federal courts will not examine the substantive merits of those decisions,³⁸ and EPA cannot formally present a dispute about the decision to CEQ. In short, there is no external check upon what an agency may decide to do once it complies with the procedural niceties of NEPA.

32. See CEQ Regulations, 40 C.F.R. §§ 1504.1-1504.3 (1987).

33. Referrals must be delivered to CEQ within 25 days after the final EIS has been made available to EPA, commenting agencies, and the public. See *id.* § 1504.3(b). Agency decisions on a proposed action, on the other hand, may not be made until at least 30 days after the final EIS has been made available. See CEQ Regulations, 40 C.F.R. § 1506.10(b)(2) (1987).

34. The CEQ regulations make no provision for decisional referrals, as opposed to predecisional referrals. See CEQ Regulations, 40 C.F.R. §§ 1500.1-1508.28 (1987). See also Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,036 (1981) (reprinting a memorandum from the General Counsel of CEQ) (stating in the answer to question 33b that a referral of an interagency disagreement may not be made after an agency has issued its decision) [hereinafter CEQ Forty Most Asked Questions].

35. See CEQ: National Environmental Policy Act, 43 Fed. Reg. 55,978, 55,979-80 (1978) [hereinafter Preamble to CEQ Regulations].

36. See CEQ Regulations, 40 C.F.R. § 1505.1(e) (1987).

37. See *id.* § 1505.2(c). In addition, the record of decision must state what the decision was, *id.* § 1505.2(a), and specify which alternative or alternatives were considered to be environmentally preferable, *id.* § 1505.2(b).

38. Because the CEQ regulations mandate the preparation of a record of decision, a federal court might order its preparation in the event an agency ignored its duty. The substantive content of the decision, however, is another matter altogether.

Moreover, even if high-level executive oversight were available to ensure that the EIS more fully informs federal decisionmaking, an additional problem would remain. The action as set forth in the record of decision must still be carried out. Perhaps most significant in this regard is the need to implement those measures adopted in the record of decision that are designed to mitigate the adverse environmental impacts associated with the project. The CEQ regulations state that these mitigation measures "shall be implemented."³⁹ Once again, however, there is no regulatory mechanism whereby EPA can refer an instance of nonimplementation to CEQ for its resolution.⁴⁰ On the other hand, a federal court could order compliance, but before such mitigation commitments can be enforced they must find their way into the decision document itself. Hence, a judicial approach yields only a partial solution to the problem because any agency that wishes to avoid a particular form of mitigation can simply omit it from the record of decision.

This article explores a number of administrative modifications which would create a more effective link between the impact statement, agency decisionmaking, and what agencies actually do. Since any such modifications must conform with congressional intent, the article begins with an exploration of the legislative history of NEPA and section 309 of the Clean Air Act to more thoroughly establish what Congress intended to achieve through NEPA and how executive branch oversight was intended to serve those ends. The article then examines both the limited fashion in which the executive branch has used its oversight authority and the inability of the judiciary to adequately ensure the integration of policy and action under NEPA.

As those sections of the article reveal, the lack of adequate external supervision appears to contravene congressional expectations. Congress anticipated that agencies, concerned as they are with their own more parochial interests, would not completely internalize the requirements of NEPA. Thus, executive branch oversight and occasional high-level intervention were authorized not only to safeguard the EIS process but to ensure that agency actions reflect the goals of NEPA.

The article argues in its final section for expanded surveillance of the manner in which NEPA is implemented. This expansion requires that EPA's watchdog role extend to records of decision and the implementation of the commitments found in those decisions. Furthermore, to enhance the effectiveness of this new role, agencies will have to provide EPA with more information on their progress in implementing their decisions, including the

39. CEQ Regulations, 40 C.F.R. § 1505.3 (1987); *see also* CEQ Forty Most Asked Questions, *supra* note 34, at 18,037 (stating in the answer to question 34d that agencies must comply with mitigation measures identified in a record of decision).

40. *See* CEQ Regulations, 40 C.F.R. §§ 1500.1-1508.28 (1987).

mitigation measures to which they are committed. Armed with these new tools, EPA would be able for the first time to refer truly "unsatisfactory" final actions to CEQ, rather than just proposals as presented, perhaps in unduly flattering terms, in an impact statement.

The eventual success of this structural reform would depend upon the ability and consistent willingness of both EPA and CEQ to supervise the back end of the NEPA process. Both agencies would, of course, need additional resources, more Presidential support, and, not least, the prudence not to intervene to such an extent that their efforts become counterproductive. The mere creation of a formal review process should encourage agencies to take their impact statements and decision documents more seriously so that the necessity for such intervention would not often arise. When absolutely necessary, however, a mechanism would exist to help ensure that the executive branch more faithfully adheres to the policy established by NEPA.

I. PUTTING POLICY INTO ACTION: THE LEGISLATIVE EVOLUTION OF THE NEPA PROCESS

A. 1968: *The Momentum Builds*

Over the course of the 1960's, Congress gradually became aware of the need to establish a new national policy which would respond to the continuing deterioration of the environment.⁴¹ This concept gained considerable force and political respectability during the summer of 1968. At that time, two reports were issued by Congress that would figure prominently in influencing the subsequent development of NEPA.⁴²

In June, the House Committee on Science and Astronautics published a report⁴³ which painted an alarming picture of a society in singular pursuit of economic expansion and technological progress. "A well intentioned but poorly informed society is haphazardly deploying a powerful, accelerating technology in a complex and somewhat fragile environment. The conse-

41. See SUBCOMM. ON SCIENCE, RESEARCH AND DEV. TO THE HOUSE COMM. ON SCIENCE AND ASTRONAUTICS, 90TH CONG., 2D SESS., *MANAGING THE ENV'T.* 1-3 (Comm. Print 1968) [hereinafter *MANAGING THE ENV'T.*]; SENATE REPORT ON NEPA, *supra* note 9, at 11-12; 115 CONG. REC. 29,067 (1969) (remarks of Sen. Jackson); R. LIROFF, *supra* note 24, at 14.

42. A number of commentators have addressed the legislative development of NEPA. See, e.g., NEPA IN THE COURTS, *supra* note 22, at 1-14; R. ANDREWS, ENVIRONMENTAL POLICY AND ADMINISTRATIVE CHANGE 7-19 (1976); F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 9.01[4] at 28-45 (1987); R. LIROFF, *supra* note 24, at 10-35; Dreyfus & Ingram, *The National Environmental Policy Act: A View of Intent and Practice*, 16 NAT. RESOURCES J. 243 (1976); Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230 (1970).

43. *MANAGING THE ENV'T.*, *supra* note 41.

quences are only vaguely discernible."⁴⁴ Implicit in that description was the view that important decisions regarding the management of the environment were being made with little, if any, appreciation of possible environmental harm. The report thus placed great emphasis upon the need to collect additional scientific data which would better inform the decisionmaking process.⁴⁵

The report recognized, however, that additional scientific information was not enough. An overall national policy reflecting environmental values was required to foster a more balanced, hence wiser, approach to our management of the environment.⁴⁶ While acknowledging that such an environmental policy might conflict with the mission-related activities of many federal agencies,⁴⁷ the report assumed that those agencies, armed with better information and influenced by congressionally articulated environmental values, would somehow do the right thing.⁴⁸ Despite this rather naive assumption and its possible technocratic bias, the report did pinpoint the frequent failure and inability of the federal government to consider the environmental consequences of its actions.

In July, the Senate Committee on Interior and Insular Affairs fueled the emerging debate by publishing a study entitled "A National Policy for the Environment."⁴⁹ The study did not shy away from assessing the impact of human activity upon the environment. "It is now becoming apparent that we cannot continue to enjoy the benefits of our productive economy unless we bring its harmful side effects under control."⁵⁰ In order to obtain this control, the study concluded that a national policy for the environment was necessary.⁵¹ This policy, however, "must be principle which can be applied in action."⁵²

To make such a new policy effective, the study suggested the creation of a high-level agency within the executive branch which would identify and analyze various environmental issues.⁵³ The new agency would then be

44. *Id.* at 6 (emphasis omitted).

45. *See, e.g., id.* at 6 ("If errors in management are to be minimized, a greatly accelerated search for knowledge of the environment is necessary.").

46. *See id.* at 5.

47. *See id.* at 5, 30.

48. *See id.* at 30.

49. SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 90TH CONG., 2D SESS., A NATIONAL POLICY FOR THE ENV'T: A SPECIAL REPORT (Comm. Print 1968) [hereinafter A NAT'L POLICY FOR THE ENV'T]. This study was prepared by Professor Lynton Caldwell of Indiana University, *id.* at IV, and contained an opening statement by Senator Henry Jackson, the committee's chairman, *id.* at III-IV.

50. *Id.* at 4.

51. *Id.*

52. *Id.* at IX-X.

53. *See id.* at 11-13.

responsible for suggesting alternative courses of action to the President and Congress for their consideration.⁵⁴

The Senate study, therefore, discerned the danger of muddling through the decisionmaking process without a policy which openly acknowledged the existence and importance of environmental quality. In addition, the study recognized that this policy would have to be capable of being applied to actual problems. The study's proposal for implementing this new policy, however, was limited to a method by which overarching environmental issues could be presented to the President and Congress. There was no consideration of how to reorient in an effective manner the thinking and biases of the many federal agencies that had traditionally taken a narrow approach to achieving their immediate policy objectives.

The publication of these two documents was closely followed by a joint House-Senate colloquium to consider a national policy for the environment⁵⁵ and the issuance of a white paper containing possible elements of that policy.⁵⁶ By this time, a consensus seemed to be emerging in Congress that the physical alteration of the environment had to be planned rather than left to happenstance.⁵⁷ A process to assure that environmental planning would occur in day-to-day federal decisionmaking, however, remained to be invented. Nevertheless, the issue had moved to the top of the congressional agenda.

B. 1969: NEPA Emerges

Early in 1969 Senator Henry Jackson introduced Senate Bill 1075.⁵⁸ In his introductory remarks, Senator Jackson announced that his bill would establish a national strategy for managing the human environment.⁵⁹ It was, however, far from clear how the provisions of his bill would do so. S. 1075, strangely enough, did not set forth any grand national environmental policy. Rather, the bill merely stated that its purpose was to promote

54. See *id.* at 11, 19.

55. *Joint House-Senate Colloquium to Discuss a Nat'l Policy for the Env't: Hearing Before the Senate Comm. on Interior and Insular Affairs and the House Comm. on Science and Astronautics*, 90th Cong., 2d Sess. (1968). The colloquium, co-chaired by Senator Jackson and Representative Miller, was an informal study session which brought together legislators, government officials, academics, and other concerned citizens. Dreyfus & Ingram, *supra* note 42, at 249.

56. SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS AND THE HOUSE COMM. ON SCIENCE AND ASTRONAUTICS, 90TH CONG., 2D SESS., CONGRESSIONAL WHITE PAPER ON A NAT'L POLICY FOR THE ENV'T (Comm. Print 1968).

57. See, e.g., *id.* at 11.

58. S. 1075, 91st Cong., 1st Sess. (1969), reprinted in *National Environmental Policy: Hearing on S. 1075, S. 237, and S. 1752 Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 1-3 (1969) [hereinafter *Senate NEPA Hearings*].

59. 115 CONG. REC. 3,698 (1969) (statement of Sen. Jackson).

measures to prevent or reduce adverse environmental harm.⁶⁰ To that end, the bill would have authorized the Secretary of the Interior to perform environmental research⁶¹ and would have established a Council on Environmental Quality in the Executive Office of the President to study environmental trends and advise the President on the formulation of environmental policy.⁶² Senator Jackson's thinking, therefore, appears not to have progressed very far from the proposal that had been floated during the previous summer.⁶³

Representative John Dingell also introduced a bill near the beginning of the Ninety-First Congress.⁶⁴ Unlike Senator Jackson's bill, Representative Dingell's bill set forth a ringing declaration of national environmental policy⁶⁵ which would later be codified, in slightly altered form, as section 101(a) of NEPA.⁶⁶ Nevertheless, his bill fell short of creating a means through which this ambitious objective could be achieved, providing only for the creation of CEQ.⁶⁷ Over the remaining months of 1969, both houses of Congress, but especially the Senate, would struggle with developing some way to influence ordinary federal decisionmaking.

The Senate hearings played a pivotal role in the search for an action-forcing mechanism.⁶⁸ During his appearance, Professor Lynton Caldwell⁶⁹ criticized the muddled nature of the legislation which was pending before the Senate Committee on Interior and Insular Affairs. First, he asserted that the "absence of an adequate policy statement" was a serious omission.⁷⁰

60. S. 1075, at 1-2, *reprinted in Senate NEPA Hearings*, *supra* note 58, at 1.

61. *Id.* § 101, *reprinted in Senate NEPA Hearings*, *supra* note 58, at 1-2.

62. *Id.* §§ 201-202, *reprinted in Senate NEPA Hearings*, *supra* note 58, at 2-3; *see* Dreyfus & Ingram, *supra* note 42, at 250 (describing the limited nature of Sen. Jackson's bill).

63. In fact, Senator Jackson seemed to have retreated from at least one position he took during the preceeding summer. At that time, he stated that the government will have to "pay closer attention to a far greater range of alternatives and potential consequences when [making decisions that affect the environment]." A NAT'L POLICY FOR THE ENVIRONMENT, *supra* note 49, at III-IV (introductory statement by Sen. Jackson). That introductory remark seems to have presaged, albeit in rather cursory fashion, two of the most significant elements of NEPA's impact statement requirement. *See supra* note 11 and accompanying text.

64. H.R. 6750, 91st Cong., 1st Sess. (1969), *reprinted in Environmental Quality: Hearings on H.R. 6750, H.R. 11886, H.R. 11942, H.R. 12077, H.R. 12180, H.R. 12207, H.R. 12209, H.R. 12228, H.R. 12264, H.R. 12409 Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 91st Cong., 1st Sess. 3-4 (1969) [hereinafter *House NEPA Hearings*].

65. H.R. 6750 § 5A(a), *reprinted in House NEPA Hearings*, *id.* at 3.

66. NEPA § 101(a), 42 U.S.C. § 4331(a) (1982).

67. H.R. 6750 § 5A(c), *reprinted in House NEPA Hearings*, *supra* note 64, at 3.

68. *See generally Senate NEPA Hearings*, *supra* note 58.

69. Professor Caldwell was a professor of government at Indiana University. *Id.* at 112. He authored the study entitled A NAT'L POLICY FOR THE ENV'T, which the Committee on Interior and Insular Affairs had published in 1968. *See supra* note 49.

70. *Senate NEPA Hearings*, *supra* note 58, at 134 (statement of Prof. Caldwell); *see also id.* at 83 (Sen. Jackson's characterization of this aspect of Prof. Caldwell's critique of S. 1075).

Second, he argued that even an adequate policy statement was not enough without some process for its implementation. Professor Caldwell, therefore, called for the creation of an "action-forcing" measure that would compel federal agencies "to take the kind of action which will protect [the quality of the nation's environment]." ⁷¹ As to the details, he was somewhat vague, but he did suggest that Congress might consider requiring federal agencies to evaluate the environmental effects of their proposed activities. ⁷²

Senator Jackson was quite taken by Professor Caldwell's testimony, the criticism of S. 1075 notwithstanding. ⁷³ After revealing that he, too, had been concerned with the adequacy of the "policy declaration" in his bill, ⁷⁴ Senator Jackson stated:

I agree with you that realistically what is needed in restructuring the governmental side of this problem is to legislatively create those situations that will bring about an action-forcing procedure the departments must comply with. Otherwise, these lofty declarations are nothing more than that. It is merely a finding and statement but there is no requirement as to implementation. ⁷⁵

He then proffered a possible remedy: Perhaps all federal agencies "should be required to make an environmental finding" in connection with particular actions. ⁷⁶

During the hearings, however, much more attention was focused upon the proposed creation of CEQ. A number of federal agencies expressed their opposition to its establishment because President Nixon was about to assemble an interdepartmental environmental council composed primarily of cabinet officers. ⁷⁷ Many senators and others, therefore, rushed to defend the concept of a more independent council. ⁷⁸ In the process, some light was shed upon the role envisioned for such a council. Professor Caldwell, for example, testified that "an independent forum" was necessary to watch over the nation's environment. ⁷⁹ Only a high-level, independent institution

71. *Id.* at 116.

72. *See id.*

73. Senator Jackson may have been nonplussed by this criticism since he had freely admitted that S. 1075 was "a working paper." *Id.* at 83.

74. *Id.* at 116. Senator Jackson may well have been referring to the brief statement of purpose that appeared in the original draft of S. 1075. *See* text accompanying note 60.

75. *Senate NEPA Hearings, supra* note 58, at 116.

76. *Id.* at 117.

77. *See, e.g., id.* at 3-4 (comments of the Department of the Interior); *id.* at 4-6 (comments of the Department of Agriculture); *id.* 6-7 (comments of the Bureau of the Budget). Dr. Lee DuBridge, the President's Science Advisor, stated that this council would bring together a few cabinet members, under the chairmanship of the President, to discuss and deal with various environmental concerns. *Id.* at 71-72.

78. *See, e.g., id.* at 62-63 (statement of Sen. Nelson); *id.* at 66-67 (statement of Rep. Reuss); *id.* at 84-86 (remarks of Sen. Jackson); *id.* at 149-51 (remarks of Michael McCloskey, Sierra Club).

79. *Id.* at 114.

could "be counted upon . . . to raise the difficult and inconvenient questions."⁸⁰ Senator Jackson agreed and stressed the importance of locating such a council in the Executive Office of the President in order to provide an effective counterpoint to the more parochial views of the established agencies.⁸¹

At the conclusion of the hearings, the committee went into executive session to draft its version of the bill.⁸² When the bill was reported on July 9, 1969, it was obvious that the committee had taken Professor Caldwell's critique to heart. The bill sent to the full Senate announced a national policy for the environment in much the same form as now appears in section 101 of NEPA.⁸³ In addition, the bill contained an action-forcing mechanism that would require an agency "finding" with regard to the environmental impact of major federal actions.⁸⁴

In reporting on S. 1075, the committee noted that its membership was of the unanimous opinion that existing public policies and governmental institutions were unable to cope with the environmental problems confronting the nation.⁸⁵ The bill, therefore, set forth a comprehensive national policy to reorder national priorities⁸⁶ as well as the action-forcing procedure of section 102 to help "insure that the policies enunciated in section 101 are implemented."⁸⁷ The report also dealt with the institutional arrangements created by the bill to oversee the manner in which the federal bureaucracy responds to the challenge of environmental management.

As in the original version of S. 1075, the committee's bill would create an environmental quality council in the Executive Office of the President to perform a variety of functions.⁸⁸ One such task was to "periodically review and appraise" federal activities which affect the quality of the nation's environment.⁸⁹ According to the committee's report, however, this

80. *Id.* at 119. He added that this would be such a difficult task that service on the council "would probably preclude a future political career for a person who would [serve on it]." *Id.* at 120.

81. *See id.* at 120.

82. SENATE REPORT ON NEPA, *supra* note 9, at 11.

83. Compare S. 1075, as amended, 91st Cong., 1st Sess. § 101 [hereinafter Amended S. 1075], reprinted in SENATE REPORT ON NEPA, *supra* note 9, at 1-2 with NEPA § 101, 42 U.S.C. § 4331 (1982).

84. Amended S. 1075, *supra* note 83, § 102(c), reprinted in SENATE REPORT ON NEPA, *supra* note 9, at 2.

85. *See* SENATE REPORT ON NEPA, *supra* note 9, at 4.

86. *See id.* at 5.

87. *Id.* at 19. Thus, according to the committee, § 102 was "designed to assure that all Federal agencies plan and work toward meeting the challenge of a better environment." *Id.* at 9.

88. *See* Amended S. 1075, *supra* note 83, §§ 301-305, reprinted in SENATE REPORT ON NEPA, *supra* note 9, at 3-4 (now referring to this council as "a Board of Environmental Quality Advisors").

89. *Id.* at § 302(b), reprinted in SENATE REPORT ON NEPA, *supra* note 9, at 4.

role was limited to the examination of the "general direction" of federal programs in order to "provide the President with a new insight into the long-range needs and priorities of the country."⁹⁰ The responsibility for "day-to-day decisionmaking" and the resolution of interagency disputes, in the committee's view, would more properly reside with the President or an existing agency like the Bureau of the Budget.⁹¹ On July 10, 1969, the Senate passed the committee's bill by unanimous consent, without debate, and referred the bill to the House of Representatives.⁹²

The House, in the meantime, held hearings on Representative Dingell's bill.⁹³ Those hearings produced little of real significance except to stress the value of a high-level, independent CEQ within the Executive Office of the White House.⁹⁴ Some witnesses apparently thought that CEQ could play an important role in implementing the bill's ambitious policy statement.⁹⁵ From Representative Dingell's remarks, however, it is difficult to discern whether he envisioned CEQ's function as an aggressive overseer of administrative action or as a long-range planning and assessment tool.⁹⁶ While he did express concern at one point about how to ensure that the bill's policy would influence agency decisionmaking, he seemed content to rely upon an annual CEQ report, congressional oversight, and vigorous public participation to police agency action.⁹⁷

When House Bill 12549 emerged from committee, it was nearly identical to Representative Dingell's original bill.⁹⁸ It thus merely set forth a policy declaration⁹⁹ and provided for the creation of CEQ.¹⁰⁰ The committee's report did articulate a somewhat coherent role for CEQ. The principal purpose of CEQ was to "provide a consistent and expert source of review

90. SENATE REPORT ON NEPA, *supra* note 9, at 24-25.

91. *Id.* at 25. In addition, the committee suggested that the President's new cabinet-level environmental council could perform this sort of immediate supervision. *Id.*

All of the functions performed by the Bureau of the Budget were transferred to the newly-established Office of Management and Budget in 1970. Reorg. Plan No. 2 of 1970, 3 C.F.R. 1070 (1966-1970), *reprinted in* 5 U.S.C. app. at 1129-30 (1982).

92. 115 CONG. REC. 19,008-13 (1969).

93. *House NEPA Hearings*, *supra* note 64.

94. *See, e.g., id.* at 120 (remarks of Lloyd Tupling, Sierra Club); *id.* at 363 (remarks of Rep. Pelly).

95. *See, e.g., id.* at 55 (remarks of William Towell, American Forestry Association); *id.* at 424 (remarks of Peter Hunt, Peter Hunt Associates).

96. *Compare id.* at 137 (calling CEQ "an institution which can speak fearlessly" on environmental questions) *with id.* at 2 (describing CEQ as an "independent body" to study and analyze environmental "trends").

97. *See id.* at 424 (colloquy with Peter Hunt, Peter Hunt Associates).

98. *Compare* H.R. 6750, *reprinted in House NEPA Hearings*, *supra* note 64, at 3-4, *with* H.R. 12549, as reported, 91st Cong., 1st Sess. (1969), *reprinted in* HOUSE REPORT ON NEPA, *supra* note 15, at 23-24.

99. H.R. 12549, *supra* note 98, § 5A(a), *reprinted in* HOUSE REPORT ON NEPA, *supra* note 15, at 23.

100. *Id.* § 5A(c), *reprinted in* HOUSE REPORT ON NEPA, *supra* note 15, at 23.

of national policies, environmental problems and trends, both long term and short term.”¹⁰¹ In more immediate terms, however, CEQ was expected to maintain “a constant review of Federal programs and activities . . . [and keep] the President informed on the degree to which those programs and activities may be consistent with [the policy established by the bill].”¹⁰² The report acknowledged, moreover, that CEQ might become an asset as an instrument for resolving internal policy disputes within the executive branch.¹⁰³

On September 23, 1969, the House passed the committee’s bill by the overwhelming margin of 372 to 15,¹⁰⁴ but not before a number of representatives emphasized CEQ’s role as a monitor of agency compliance with the bill. Representative Daddario summarized their views perhaps most succinctly when he referred to CEQ as a “watchdog for the public and the Congress on the activities of the Federal departments.”¹⁰⁵

Since the Senate had already passed another version of the bill, the House immediately requested a conference.¹⁰⁶ A curious thing then occurred before the Senate agreed to the conference: It amended the bill.

A jurisdictional clash had been stirring for some time between Senator Jackson and Senator Muskie, chairman of the Air and Water Pollution

101. HOUSE REPORT ON NEPA, *supra* note 15, at 8.

102. *Id.* at 10.

103. *Id.* at 8.

104. 115 CONG. REC. 26,590 (1969). Prior to its passage, however, Representative Aspinall was successful in obtaining, or perhaps coercing, an amendment which stated that “[n]othing in this Act shall increase, decrease, or change any responsibility or authority of any Federal official or agency” *Id.* at 26,589-90 (adding § 9 to H.R. 12549). Had this language not been dropped subsequently by the conference committee, the amendment would have “negated” the action-forcing provisions found in the Senate version of NEPA. NEPA IN THE COURTS, *supra* note 22, at 7; *see also* R. ANDREWS, *supra* note 42, at 11 (stating that this provision would have made NEPA “an unenforceable statement of general policy”).

While Representative Dingell may not have favored this amendment, it has been suggested that he had little choice but to accept it. *See id.* at 11 n.19. Representative Aspinall not only disliked NEPA, *see* R. LIROFF, *supra* note 24, at 11, but, as a committee chairman and member of the Rules Committee, he might have been able to keep the bill from ever coming to a vote. Thus, acceptance of this amendment may well have been the price for letting the bill reach the House floor. *See id.*

105. 115 CONG. REC. at 26,583 (1969); *see also id.* at 26,576 (remarks of Rep. Rogers (Florida)) (stating that continuing CEQ review of federal activities “is necessary because the various agencies and departments of the Federal government do not always act harmoniously” in their use of the environment); *id.* at 26,576-77 (remarks of Rep. Karth) (describing the creation of CEQ as an institutional arrangement “which will put policy into practice”); *id.* at 26,579 (remarks of Rep. Yates) (expressing his hope that CEQ “will act as an ardent advocate of the need to protect our besieged natural resources and not merely as a study group”); *id.* at 26,584 (remarks of Rep. Monagan) (calling for a CEQ that would “oversee and coordinate the multiple and often conflicting programs pursued by the different levels of government”). Representatives Rogers and Karth were majority members of the subcommittee which developed the House bill.

106. *Id.* at 26,591. Representatives Dingell, Garmatz, Aspinall, Pelly, and Saylor were named as House conferees. *Id.*

Subcommittee of the Senate Committee on Public Works.¹⁰⁷ While Senator Jackson's committee developed S. 1075, Senator Muskie was pushing the Water Quality Improvement Act toward final Senate action.¹⁰⁸ In time Senator Muskie became troubled about an apparent conflict between the two bills.

Senator Muskie's bill would require a state water quality certification as a condition precedent to the issuance of any federal license or permit for an activity that might result in the discharge of water pollutants.¹⁰⁹ He believed that this was necessary to check the natural proclivity of development-oriented agencies to ignore adverse effects upon water quality.¹¹⁰ S. 1075, on the other hand, would allow these same developmental agencies to make "finding[s]" concerning the environmental impact of their own activities. Senator Muskie argued that such a "concept of self-policing by Federal agencies which pollute or license pollution [was] contrary" not only to his proposed legislation but also to the philosophy of existing pollution control law.¹¹¹ It would be all too easy for an agency to elevate its primary mission over environmental considerations.¹¹²

In order to resolve this inconsistency, Senators Muskie and Jackson negotiated a belated amendment to the pending NEPA legislation. Their compromise substituted the requirement of a "detailed statement" for the

107. See NEPA IN THE COURTS, *supra* note 22, at 7; R. ANDREWS, *supra* note 42, at 12. While Senator Muskie's subcommittee clearly enjoyed jurisdiction over pollution control matters, it was unclear where to draw the line between his subcommittee and Senator Jackson's Committee on Interior and Insular Affairs on a measure dealing broadly with environmental quality. See 115 CONG. REC. 29,054-55 (1969) (remarks of Sen. Jackson). Further, this "turf fight" was likely motivated, at least in part, by the desire of both Senators to gain reputations as "good" environmentalists, especially since the presidential primary season was in the offing. See generally R. ANDREWS, *supra* note 42, at 12 (reporting that the two Senators were engaged in a struggle for "environmental prestige").

108. See R. ANDREWS, *supra* note 42, at 12.

109. S. 7, as reported, 91st Cong., 1st Sess. § 103 (1969) (amending redesignated § 16(c) of the Federal Water Pollution Control Act), reprinted in S. REP. 346, 91st Cong., 1st Sess. 113-15 (1969). A quite similar provision was eventually enacted as § 103 of the Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91 (1970) (amending redesignated § 21 of the Federal Water Pollution Control Act) (superceded 1972). Today, the Clean Water Act contains a nearly identical requirement. See Clean Water Act § 401(a), 33 U.S.C. § 1341(a) (1982).

110. 115 CONG. REC. 29,053 (1969) (remarks of Sen. Muskie).

111. *Id.* at 29,052-53.

112. *Id.* at 29,053. In short, Senator Muskie harbored serious doubts about the reliability of environmental findings made by mission-oriented public works agencies. See R. LROFF, *supra* note 24, at 18-19; Dreyfus & Ingram, *supra* note 42, at 253.

In addition to his hostility to the concept of "self-policing," Senator Muskie appeared worried about the impact of an agency's environmental "finding" upon the requirement of state water quality certification in his bill. See *id.* at 29,052-53. For example, if an agency found that a particular action involved acceptable environmental harm, would it still have to obtain a clean bill of health from the affected state?

"finding" in section 102(c).¹¹³ Thus, according to Senator Muskie, a "polluter" would not have the final word in the assessment of environmental effects.¹¹⁴ In addition, the Senators inserted a new directive. Prior to making such a "detailed statement," the agency contemplating action would have to consult with and obtain the views of those agencies which possess relevant environmental authority or expertise.¹¹⁵ In Senator Muskie's view, these changes would give those agencies most concerned with environmental quality an opportunity to supervise the NEPA process.¹¹⁶ During the ensuing debate, no senator questioned Senator Muskie's characterization of the new language.¹¹⁷

Apparently pleased with these changes and relieved that the jurisdictional dispute had been resolved, the Senate accepted the terms of the Muskie-Jackson compromise.¹¹⁸ The bill, cast in its new form, then went to conference.¹¹⁹

After two months of deliberation, the conference committee agreed upon a substitute bill and issued its report on December 17, 1969.¹²⁰ The compromise struck by the conference generally blended the provisions of the House and Senate bills. Consequently, the declaration of environmental policy and the provisions creating CEQ contained significant elements from both earlier bills.¹²¹ The conference, however, accepted the action-forcing procedures found in section 102 of the Senate bill, for which there was no comparable provision in the House version.¹²² In doing so, the conferees

113. S. 1075, as modified by the Muskie-Jackson compromise, 91st Cong., 1st Sess. § 102(c), 115 CONG. REC. 29,051 (1969).

114. 115 CONG. REC. 29,053 (1969). Moreover, to resolve any possible remaining inconsistency between NEPA and various pollution requirements, *see supra* note 112, the Senators agreed to add a new § 103 which explicitly stated that § 102 does not in any way affect the statutory obligations that a federal agency may have to abide by environmental standards or to obtain a certification from a state agency. S. 1075, as modified by the Muskie-Jackson compromise, 91st Cong., 1st Sess. § 103, 115 CONG. REC. 29,051-52 (1969); *see also* 115 CONG. REC. 29,058 (1969) (memorandum submitted by Sen. Jackson discussing the addition of § 103).

115. S. 1075, as modified by the Muskie-Jackson compromise, 91st Cong., 1st Sess. § 102(c), 115 CONG. REC. 29,051 (1969).

116. 115 CONG. REC. 29,053 (1969).

117. *See* 115 CONG. REC. 29,053-89 (1969). Senator Church perhaps reflected the general sentiment in the Senate when he praised S. 1075 as the first legislative effort "to impress and implant on the Federal agencies an awareness and concern for the total environmental impact of their actions and proposed programs." *Id.* at 29,059.

118. *Id.* at 29,087-89.

119. Senators Jackson, Church, Nelson, Allott, and Jordan (Idaho) were appointed as the Senate conferees. *Id.* at 29,089. They were specifically instructed to insist on the modifications made by the Jackson-Muskie compromise. *Id.* at 29,087-89.

120. CONFERENCE REPORT ON NEPA, *supra* note 7.

121. *See id.* at 7-8, 11-12 (statement of the managers on the part of the House); *see generally* R. ANDREWS, *supra* note 42, at 13-14 (discussing the significant modifications made to the bills during conference).

122. CONFERENCE REPORT ON NEPA, *supra* note 7, at 8-10 (statement of the managers on the part of the House).

added some language to section 102 that underscored the vigor with which federal agencies were to implement those action-forcing mechanisms.

The conference inserted the requirement that all federal agencies must comply "to the fullest extent possible" with the provisions of section 102.¹²³ According to the conference report, this phrase compels total compliance from the agencies unless existing law expressly prohibits full compliance or renders compliance impossible.¹²⁴ Senator Jackson, therefore, was able to say with considerable confidence that section 102 would help "insure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the Federal Government"¹²⁵

His sanguine assessment obviously flowed from his hope that section 102, in its final form, would lead action-oriented federal agencies to internalize environmental quality considerations in their decisionmaking processes.¹²⁶ Senator Jackson, however, was also keenly aware of the role that certain external forces would play in modifying agency behavior. He noted that the requirement for consultation with environmental agencies was, in and of itself, an important "action-forcing" procedure.¹²⁷ Moreover, he fully anticipated high-level executive branch oversight.¹²⁸

The final version of the bill also led Senator Muskie to claim that it would exert strong pressure on federal agencies "to respond to the needs of environmental quality."¹²⁹ His positive evaluation appeared heavily influenced by the conference committee's adoption of those aspects of the Muskie-Jackson compromise which would seem to ensure continuing ad-

123. *Id.* at 8.

124. *Id.* at 9.

125. 115 CONG. REC. 40,416 (1969). *See also id.* at 40,419 (section-by-section analysis offered by Sen. Jackson) (stating that the "action-forcing procedures" of § 102 are intended "to insure that the policies enunciated in section 101 are implemented"). Thus, Senator Jackson concluded, "[I]f there are to be departures from this standard of [environmental] excellence [created by NEPA] they should be exceptions to the rule and the policy." *Id.* at 40,416.

126. *See* R. LIROFF, *supra* note 24, at 18-19.

127. 115 CONG. REC. 40,416 (1969).

128. *See id.* at 40,421 (section-by-section analysis offered by Sen. Jackson). In reviewing high-level executive branch oversight, Senator Jackson drew heavily upon the wording of the Senate committee report. *Compare id.* with SENATE REPORT ON NEPA, *supra* note 9, at 24-25. He thus stated that the Council on Environmental Quality would "periodically examine the general direction" of federal programs with regard to their environmental effects and would provide the President with "general" recommendations for any necessary reforms in those programs. 115 CONG. REC. 40,421 (1969) (section-by-section analysis offered by Sen. Jackson). Senator Jackson, furthermore, was careful to avoid any suggestion that CEQ would displace the existing decisionmaking apparatus for resolving interagency disputes. Consequently, he indicated that the burden of resolving such conflicts would remain the province of the President, a cabinet-level council, or the Bureau of the Budget. *See id.*; *see also id.* at 40,925 (reply of Rep. Dingell to written inquiries from Rep. Fallon) (similarly stating that CEQ would examine the "general" impact of federal activities upon the environment and make "general" recommendations for change, but would not involve itself in the resolution of particular conflicts between federal agencies).

129. 115 CONG. REC. 40,425 (1969).

ministrative oversight of the NEPA process: the requirement that developmental agencies issue detailed statements, rather than findings, only after consultation and review from more environmentally-minded agencies.¹³⁰ Senator Muskie, thus observed, most likely with considerable satisfaction, that those agencies whose activities might harm the environment would not have the last word on the environmental impact of their actions.¹³¹

With the Christmas recess looming near, neither the House nor the Senate was particularly disposed to prolonging the debate over the merits of the conference report.¹³² Consequently, both houses quickly took action and approved the report.¹³³ On New Year's Day 1970, President Nixon signed NEPA into law.¹³⁴

C. 1970: Creating an Institutional Watchdog

The glowing Congressional assessments of December 1969 soon began to pale in light of actual experience. Many agencies simply failed to appreciate the new procedural and substantive demands made by NEPA. The environmental agencies, moreover, appeared either unable or unwilling to counter the resistance offered by older and stronger components of the executive branch. Out of sheer exasperation, therefore, Congress enacted section 309 of the Clean Air Act Amendments of 1970¹³⁵ which significantly augmented NEPA's previously inadequate provision for administrative oversight.¹³⁶ Although the legislative history of section 309 is sparse, it does reveal the pressing need, as perceived by Congress, for an institutional arrangement which would continuously and forcefully police federal action for compliance with NEPA.

By the summer of 1970, a number of Senators had become skeptical about the efficacy of the consultation and commenting mechanism established by section 102 of NEPA. Their concern surfaced in the Subcommittee

130. *See id.*

131. *See id.*; *see also* R. ANDREWS, *supra* note 42, at 13 (stating that these two changes strengthened the action-forcing provisions of NEPA by creating "mechanisms for external review and challenge").

132. *See* 115 CONG. REC. 40,415-27 (1969) (Senate consideration of the conference report—Dec. 20, 1969); *id.* at 40,923-28 (House consideration of the conference report—Dec. 22, 1969). Both houses adjourned on December 23, 1969. *Id.* at 41,009 (House action); *id.* at 41,167 (Senate action).

133. *See id.* at 40,427 (Senate adoption of conference report); *id.* at 40,928 (House adoption of conference report).

134. Remarks on Signing the National Environmental Policy Act of 1969, 1970 PUB. PAPERS 1 (January 1, 1970).

135. Clean Air Act § 309, 42 U.S.C. § 7609 (1982).

136. This refers, of course, to the obligation placed upon any agency which is developing an EIS to consult with and obtain the views of the relevant environmental agencies prior to embarking upon any potentially harmful action. *See* NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1982).

on Air and Water Pollution of the Senate Committee on Public Works during its consideration of proposed amendments to the Clean Air Act. Although neither the original bills¹³⁷ nor the hearings¹³⁸ addressed the problem of overseeing the implementation of NEPA, the bill which the subcommittee, chaired by Senator Muskie, eventually submitted to the full committee did.¹³⁹

The subcommittee's approach to the problem, however, was not comprehensive. The bill required the Secretary of Health, Education and Welfare (HEW)¹⁴⁰ to review the air pollution aspects of any environmental impact statement prepared by the federal government.¹⁴¹ In the event that any such "detailed statement" was found "unsatisfactory from the standpoint of public health or welfare or environmental quality," the Secretary was ordered to refer the matter to CEQ, which would make a recommendation to the President.¹⁴² The bill, therefore, was apparently limited to an evaluation of the air pollution impacts associated with a particular federal proposal.¹⁴³ Nevertheless, the subcommittee's bill did require that such a review take place, regardless of whether the agency contemplating action had requested it, and also provided an explicit avenue for elevating a dispute over an EIS to the level of CEQ.

Within a month, the full committee reported its bill to the Senate.¹⁴⁴ The bill retained this new, but as yet narrow, approach to NEPA review and

137. See S. 3229, 91st Cong., 1st Sess. (1969) (by Sen. Muskie); S. 3466, 91st Cong., 2d Sess. (1970) (by Sen. Scott); S. 3546, 91st Cong., 2d Sess. (1970) (by Sen. Muskie).

138. See *Air Pollution—1970, Pts. 1-5: Hearings on S. 3229, S. 3466, S. 3546 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 91st Cong., 2d Sess. (1970) [hereinafter *Senate Clean Air Act Hearings*]. One environmentalist did point out that the mission-oriented agencies were bound to resist the reorientation in policy required by NEPA. *Id.* Pt. 4, at 1209 (statement by Frank M. Potter, Jr., Executive Director of the Environmental Clearinghouse) ("It remains to be seen . . . to what extent the executive agencies will be successful in their inevitable efforts to weaken the impact of [NEPA].").

139. *Id.* Pt. 5, at V-LXXXVIII.

140. At this time, the Secretary of Health, Education, and Welfare administered the Clean Air Act. See 42 U.S.C. § 1857-1857I (Supp. IV 1964). Within the sprawling halls of HEW, the air pollution effort was located in the National Air Pollution Control Administration. See C. DAVIES & B. DAVIES, *THE POLITICS OF POLLUTION* 104 (2d ed. 1975).

On December 2, 1970, this authority was transferred to the newly created United States Environmental Protection Agency. Reorg. Plan No. 3 of 1970, 3 C.F.R. 1072 (1966-1970), reprinted in 5 U.S.C. app. at 1132-37 (1982) [hereinafter Reorg. Plan No. 3].

141. *Senate Clean Air Act Hearings*, Pt. 5, *supra* note 138, at LXXXVI (adding § 308(a) to the Clean Air Act).

142. *Id.* (adding § 308(b) to the Clean Air Act). CEQ's recommendation was to be made public. *Id.*

143. The provision also required the Secretary to review any proposed agency regulation, insofar as it pertained to air pollution, and to refer any such regulation deemed environmentally unsatisfactory to CEQ. See *id.* (adding § 308 to the Clean Air Act).

144. S. 4358, 91st Cong., 2d Sess. (1970), reprinted in 1 LEGISLATIVE HISTORY 1970, *supra* note 20, at 531. This action came on September 17, 1970, *id.*, and Senator Muskie was the bill's primary sponsor, *id.*

oversight.¹⁴⁵ In discussing the provision, the committee declared that "[m]ission-oriented agencies often lack the expertise to give adequate evaluation to the environmental impact of their own activities."¹⁴⁶ NEPA, moreover, did not necessarily remedy this situation since it did not "assure that Federal environmental agencies [would] effectively participate in the decision-making process."¹⁴⁷ Thus the committee believed it necessary to craft an explicit statutory provision requiring an environmental agency to review the environmental merits of various impact statements¹⁴⁸ and to refer "unsatisfactory" statements to CEQ.¹⁴⁹

The tone of the committee's report suggests that it would have liked to have extended this form of review and oversight to include the entire panoply of environmental matters. The committee, however, was constrained by the limited jurisdiction of HEW. Consequently, the scope of this review was confined to matters "directly or indirectly" related to air pollution.¹⁵⁰

So styled, the forerunner to section 309 was passed by the Senate on September 22, 1970 as part of the Clean Air Act Amendments.¹⁵¹ Since the House had already approved a different version of the bill,¹⁵² the House

145. *Id.* § 310, reprinted in 1 LEGISLATIVE HISTORY 1970, *supra* note 20, at 622-23.

146. S. REP. 1196, 91st Cong., 2d Sess. 44 (1970), reprinted in 1 LEGISLATIVE HISTORY 1970, *supra* note 20, at 444.

147. *Id.* at 43, reprinted in 1 LEGISLATIVE HISTORY 1970, *supra* note 20, at 443.

148. See *id.* at 43-44, reprinted in 1 LEGISLATIVE HISTORY 1970, *supra* note 20, at 443-44 (stating that the Secretary must analyze impact statements "with respect to public health and welfare and environmental quality").

149. *Id.* at 66, reprinted in 1 LEGISLATIVE HISTORY 1970, *supra* note 20, at 446 (section-by-section analysis).

A number of commentators, however, have expressed the opinion that the Senate bill focused environmental review merely upon the procedural adequacy of impact statements. See Anderson, *supra* note 24, at 268; Healy, *The Environmental Protection Agency's Duty to Oversee NEPA's Implementation: Section 309 of the Clean Air Act*, 3 *Envtl. L. Rep.* (Envtl. L. Inst.) 50,071, 50,080 n.62 (1973). While some language in the committee report lends support to this view, see S. REP. 1196, 91st Cong., 2d Sess. 44 (1970), reprinted in 1 LEGISLATIVE HISTORY 1970, *supra* note 20, at 444 (stating that an "inadequate" EIS must be referred), the language of the proposed legislation belies the argument.

The phrase "unsatisfactory from the standpoint of public health or welfare or environmental quality," see *supra* text accompanying note 142, certainly implicates the substantive merits of an EIS and the proposed action contained therein. Moreover, the same phrase was used to trigger the referral of a proposed agency regulation for which an EIS was not even prepared. See *supra* note 143. Since such a regulation cannot be viewed as "inadequate" using EIS criteria, the Senate committee must have meant that EISs and proposed regulations alike had to be reviewed for substantive acceptability.

150. S. REP. 1196, 91st Cong., 2d Sess. at 66, reprinted in 1 LEGISLATIVE HISTORY 1970, *supra* note 20, at 466 (section-by-section analysis).

151. 1 LEGISLATIVE HISTORY 1970, *supra* note 20, at 392-93. The bill passed unanimously by a vote of 73 to 0. *Id.*

152. H.R. 17255, 91st Cong., 2d Sess. (1970), reprinted in 2 LEGISLATIVE HISTORY 1970, *supra* note 20, at 910. The House had passed this bill on June 10, 1970. 2 LEGISLATIVE HISTORY 1970, *supra* note 20, at 888-90.

and Senate bills were referred to conference.¹⁵³

The conference committee worked hard and long.¹⁵⁴ One factor contributing to the difficulties faced by the conference was the presence of many provisions in the Senate bill having no counterpart in the House bill.¹⁵⁵ One such provision was the Senate's version of section 309.¹⁵⁶ In addition, it soon became obvious that the conferees were formulating a much more comprehensive system of administrative oversight.

When section 309 finally emerged from conference on December 17, 1970,¹⁵⁷ it had been radically refashioned. With the advent of the United States Environmental Protection Agency on December 2, 1970,¹⁵⁸ the conferees were no longer confined by the rather narrow jurisdiction which HEW had possessed. As a result, the conference version of section 309, which was ultimately enacted into law,¹⁵⁹ ordered EPA to comment in writing on all federal actions relating to EPA's duties and responsibilities including all actions which require the preparation of an impact statement.¹⁶⁰ EPA's scope of authority goes far beyond the limited horizons of clean air. In fact, EPA's authority—which includes air, water, solid waste, pesticides, radiation, drinking water, and noise—is so expansive that it encompasses virtually all environmental concerns.¹⁶¹

153. 116 CONG. REC. 33,600-01 (1970) (House action); *id.* at 34,042 (Senate action). The following Senators were appointed as conferees on the part of the Senate: Muskie, Randolph, Young (Ohio), Spong, Eagleton, Cooper, Boggs, Baker, and Dole. *Id.* at 34,042. The House named the following Representatives to the conference: Staggers, Jarman, Rogers (Florida), Springer, and Nelson. *Id.* at 33,601.

154. See 1 LEGISLATIVE HISTORY 1970, *supra* note 20, at 123 (remarks of Sen. Muskie).

155. See *id.*

156. See H.R. CONF. REP. NO. 1783, 91st Cong., 2d Sess. 58 (1970), *reprinted in* 1 LEGISLATIVE HISTORY 1970, *supra* note 20, at 208.

157. See *id.* at 1, *reprinted in* 1 LEGISLATIVE HISTORY 1970, *supra* note 20, at 151.

158. Reorg. Plan No. 3, *supra* note 140, *reprinted in* 5 U.S.C. app. at 1132-37 (1982). Pursuant to this executive reorganization, the air pollution functions previously performed by the National Air Pollution Control Administration within HEW were moved to EPA. *Id.* § 2(a)(3)(i), *reprinted in* 5 U.S.C. app. at 1133 (1982).

159. Compare H.R. CONF. REP. NO. 1783, 91st Cong., 2d Sess. 36 (1970) (§ 309), *reprinted in* 1 LEGISLATIVE HISTORY 1970, *supra* note 20, at 186 with Clean Air Act § 309, 42 U.S.C. § 7609 (1982).

160. See H.R. CONF. REP. NO. 1783, 91st Cong., 2d Sess. 36 (1970) (§ 309(a)), *reprinted in* 1 LEGISLATIVE HISTORY 1970, *supra* note 20, at 186. EPA was thus required to comment in writing on any major federal action for which an EIS should be prepared, even if the responsible agency had refused or neglected to do so. See *id.*; W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW 709 (1977). In addition, EPA had to review and comment on the environmental impact of all legislation proposed by a federal agency, newly authorized federal construction projects, and proposed regulations noticed by any federal agency—regardless of whether any of these activities were subject to the EIS requirement found in NEPA. See *id.*; NEPA IN THE COURTS, *supra* note 22, at 232.

161. See NEPA IN THE COURTS, *supra* note 22, at 231; W. RODGERS, *supra* note 160, at 709; Comment, *Section 309 of the Clean Air Act: EPA's Duty to Comment on Environmental Impacts*, 1 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,146, 10,148 (1971).

In addition to casting a broad net over the actions subject to EPA review, section 309 clearly required EPA to evaluate the environmental merits of federal action. In doing so, the conference had dropped the Senate's language which would have limited section 309 review to an evaluation of impact statements alone.¹⁶² Instead, the conference version of section 309 explicitly directed EPA to comment, *inter alia*, on "any major Federal agency action" to which NEPA applies.¹⁶³ If any such "action" is found "unsatisfactory from the standpoint of public health or welfare or environmental quality," EPA must publish the finding and refer the matter to CEQ.¹⁶⁴

While the conference report confirms the shift in focus from substantive review of impact statements to review aimed at the merits of federal action,¹⁶⁵ it sheds little light on why the conferees transformed a rather sleepy provision into such a remarkable tool.¹⁶⁶ During the course of the conference, however, the Senate Public Works Committee began hearings on the confirmation of William Ruckelshaus as the first Administrator of EPA.¹⁶⁷ The first day of those hearings—with eight of the nine Senate conferees in attendance¹⁶⁸—produced a record which, perhaps fortuitously, contains the clearest expression of what the conference hoped to gain from section 309.¹⁶⁹

162. See *supra* text accompanying notes 141-43, 148-49.

163. H.R. CONF. REP. NO. 1783, 91st Cong., 2d Sess. 36 (1970) (§ 309(a)), reprinted in 1 LEGISLATIVE HISTORY 1970, *supra* note 20, at 186.

164. *Id.* at 36 (§ 309(b)), reprinted in 1 LEGISLATIVE HISTORY 1970, *supra* note 20, at 186. By shifting the publication requirement from CEQ to EPA, see *supra* note 142 and accompanying text, the conferees may have recognized that CEQ—as an advisor to the President—"had less freedom to make frank comments than a large line agency." Liroff, *The Council on Environmental Quality*, 3 ENVTL. L. REP. (ENVTL. L. INST.) 50,051, 50,058 n.59 (1973); see also Healy, *supra* note 149, at 50,074 (stating that Congress wanted to give CEQ more flexibility in handling environmental referrals).

165. The conference report stated that although the Senate bill was limited to the examination of "environmental impact statements," the conference agreement instructed EPA to review "Federal actions which affect the environment." H.R. CONF. REP. NO. 1783, 91st Cong., 2d Sess. 58 (1970), reprinted in 1 LEGISLATIVE HISTORY 1970, *supra* note 20, at 208.

166. See *id.* at 58-59, reprinted in 1 LEGISLATIVE HISTORY 1970, *supra* note 20, at 208-09.

167. *Ruckelshaus Confirmation Hearings*, *supra* note 20. The Ruckelshaus hearings created quite a stir on Capitol Hill. The hearing room was packed with spectators and television cameras, and members of the Senate committee filled every available panel seat. All were anxious to gain some idea of how Ruckelshaus would wield the enormous power that EPA had been given. See J. QUARLES, *CLEANING UP AMERICA: AN INSIDER'S VIEW OF THE ENVIRONMENTAL PROTECTION AGENCY* 26-27 (1976).

168. *Ruckelshaus Confirmation Hearings*, *supra* note 20, at 1. The hearings began on the morning of December 1, 1970. At this initial session, the only absentee among the Senate conferees was Senator Eagleton. *Id.* The conference committee resumed its deliberations that afternoon after a recess in the confirmation hearings. See *id.* at 33, 54 (remarks of Sen. Randolph).

169. During the Senate debate on the conference report, Senator Muskie expressly referred to the discussion of the policy concerns underlying § 309 which took place during the confirmation hearings. 1 LEGISLATIVE HISTORY 1970, *supra* note 20, at 136. That remark, together with the terse explanation of § 309 found in the conference report, led Professor

From the start, it was obvious that Senator Muskie was alarmed about the lackadaisical way in which agencies had approached their consultation obligations under section 102 of NEPA. His alarm stemmed, at least in part, from the comments made on the draft EIS that the Department of Transportation had prepared for the proposed supersonic transport (SST). Since the Senate was about to debate the appropriations bill for the SST, Senator Muskie had requested a copy of the comments which the federal environmental agencies had submitted on the proposal. The request, however, was denied; the comments had been oral and thus were unavailable.¹⁷⁰ Distressed by this flippant conduct, Senator Muskie angrily charged that the NEPA consultation process "[had] been submerged and . . . given second place."¹⁷¹

This sorry state of affairs certainly did not comport with the intent of the consultation process as an effective external policing mechanism.¹⁷² Senator Muskie, therefore, soon turned his attention to section 309 which he viewed as a remedy for what seemingly had been less than vigorous external review.

Section 309, according to Senator Muskie, made EPA "a self-starter, whenever you, unilaterally, see an environmental risk. You are given the responsibility to raise the red flag."¹⁷³ EPA's role, therefore, was to be an environmental "gadfly" in order "to restrain or . . . to prevent [even] an ongoing [federal] activity if, in [the agency's judgment], there is an unfor-

Frederick Anderson to treat the relevant portions of the Ruckelshaus hearings as part of the section's legislative history. Anderson, *supra* note 24, at 269 n.106. For other materials relying upon the confirmation hearings as a significant source of legislative history, see *Hiatt Grain & Feed, Inc. v. Bergland*, 446 F. Supp. 457, 500 (D. Kan. 1978), *aff'd* 602 F.2d 929 (10th Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980); *Sierra Club v. Morton*, 379 F. Supp. 1254, 1262 (D. Colo. 1974); Healy, *supra* note 149, at 50,072 n.11; Comment, *supra* note 161, at 10,147-48.

170. See *Ruckelshaus Confirmation Hearings*, *supra* note 20, at 16-17; see also Comment, *supra* note 161, at 10,147 (elaborating on this aspect of the SST controversy).

171. *Ruckelshaus Confirmation Hearings*, *supra* note 20, at 16.

172. See *id.* at 16, 43 (remarks of Sen. Muskie). The Senate Public Works Committee, furthermore, soon issued a report which seemed to echo Senator Muskie's discontent. S. REP. NO. 1422, 91st Cong., 2d Sess. (1970). Not only did all of the Senate conferees serve on this committee, see *id.* at II, but the report was issued while the conference was still in the midst of deliberations, see *id.* at I.

The report complained that the environmental agencies, while commenting on EISs produced by the Corps of Engineers, had been inclined to examine "the views of the impact agency, rather than the impact of the project on the environment. [This practice] may tend toward developing a self-serving justification for environmental impact rather than a review of that impact." *Id.* at 6. The committee, therefore, pinpointed a serious shortcoming in the NEPA consultation process—the reluctance of federal environmental agencies to review the substantive merits of potentially harmful actions.

173. *Ruckelshaus Confirmation Hearings*, *supra* note 20, at 45. The comments of Senator Muskie are especially significant since he was "one of the prime architects" of the Clean Air Act Amendments of 1970. *Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1150 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 1042 (1980).

tunate environmental impact.”¹⁷⁴ In other words, section 309 was more than just a device to assure that mission-oriented agencies would have the benefit of EPA’s environmental expertise. It was designed to create an advocate within the executive branch that would blow the whistle on harmful environmental actions and press the case against such actions all the way to the Executive Office of the President in the form of CEQ.¹⁷⁵

None of the other Senate conferees who were present objected to Senator Muskie’s characterization of section 309.¹⁷⁶ Furthermore, nothing new was added to the discussion of section 309 during the floor debates on the Clean Air Act Amendments.¹⁷⁷ During the Senate debate, Senator Muskie was content to emphasize that EPA review would focus on “major federal actions” that affect the environment, as well as impact statements, and that EPA’s comments would be made public when the agency’s review was completed.¹⁷⁸ So construed, the Senate passed the bill.¹⁷⁹ In the House, the subject of section 309 was never broached.¹⁸⁰ That chamber approved the bill without delay,¹⁸¹ and section 309 soon became law.¹⁸²

174. *Ruckelshaus Confirmation Hearings*, *supra* note 20, at 45-46 (remarks of Sen. Muskie). Senator Muskie declared, moreover, that EPA’s responsibility vis-a-vis ongoing activities would not be diminished by the fact that “the first decision was taken 50 years ago.” *Id.* at 46.

175. In response to a general question posed by Senator Gurney concerning the role of EPA, Mr. Ruckelshaus replied:

If a decision is about to be made by another agency of Government that would have a detrimental effect on the environment, then I think we have to stir up a good deal of dispute over whether this decision should be made.

I think we have to be willing to make this advocacy right to the final decisionmaker in the administrative branch, in the White House.

I believe if we are going to be effective as an advocate for protection of the environment, we have to be willing to exercise that advocacy role within the administration as well as without.

Id. at 43. Senator Muskie picked up on that theme a few minutes later as he was describing § 309. “We want you to be the advocate that you described in response to Senator Gurney’s question.” *Id.* at 45.

176. *See id.* at 44-81.

177. The respective debates were dominated by various air pollution issues, not least of which were those concerning automobile emission standards. *See* 1 LEGISLATIVE HISTORY 1970, *supra* note 20, at 111-21 (House consideration); *id.* at 123-50 (Senate consideration); *see also* Healy, *supra* note 149, at 50,072 n.11 (stating that the importance of § 309 was consistently overshadowed by the controversy surrounding the automobile standards).

178. *See* 1 LEGISLATIVE HISTORY 1970, *supra* note 20, at 131. At this time, Senator Muskie was serving as the floor manager of the conference report. *See id.* at 123-50.

179. *Id.* at 150.

180. *See id.* at 111-21.

181. *Id.* at 121.

182. The President signed the Clean Air Act Amendments of 1970 into law on December 31, 1970. *See* Remarks on Signing the Clean Air Amendments of 1970, 1970 PUB. PAPERS 1166 (December 31, 1970).

II. THE IMPLEMENTATION OF EXECUTIVE BRANCH OVERSIGHT

A. *The Initial Experience: 1970-1978*

NEPA itself created no comprehensive structure through which the executive branch could effectively monitor and police agency compliance with NEPA. Although CEQ was assigned the duty to review the environmental impact of federal activities,¹⁸³ this responsibility was apparently restricted, according to NEPA's legislative history, to a form of passive observation. Both Senator Jackson and Representative Dingell, in fact, indicated that CEQ was to confine itself to the periodic examination of federal activities in order to give the President an accurate view of current environmental problems.¹⁸⁴ Consequently, while environmental agencies were commenting on individual impact statements and CEQ was assessing the general trend of federal programs, no particular agency was delegated the overall task of supervising agency performance under NEPA. CEQ's role, however, was destined to grow.

In March 1970, the President issued Executive Order 11,514¹⁸⁵ which established a more active role for CEQ in overseeing NEPA's implementation.¹⁸⁶ The order instructed CEQ to "coordinate" federal programs related to environmental quality, rather than just to passively observe them.¹⁸⁷ To this end, CEQ was specifically directed by the President to issue guidelines for federal agencies to use in the preparation of environmental impact statements.¹⁸⁸

CEQ soon exercised this new authority by publishing interim guidelines in April 1970.¹⁸⁹ Consistent with the executive order, the guidelines primarily addressed the development of the impact statement process.¹⁹⁰ In doing so, the guidelines added a significant new wrinkle. They required federal agencies to issue draft as well as final impact statements to provide CEQ and commenting agencies with an opportunity to study the environmental issues

183. NEPA § 204(3), 42 U.S.C. § 4344(3) (1982).

184. *See supra* note 128 and accompanying text; *see also supra* text accompanying notes 90-91.

185. 3 C.F.R. 902 (1966-1970), *reprinted at* 42 U.S.C. § 4321 app., at 10658 (1970) [hereinafter Exec. Order 11,514].

186. *See* R. ANDREWS, *supra* note 42, at 28.

187. Exec. Order 11,514, *supra* note 185, § 3(f).

188. *See id.* § 3(h).

189. CEQ, Statements on Proposed Federal Actions Affecting the Environment: Interim Guidelines, 35 Fed. Reg. 7390 (1970) [hereinafter CEQ 1970 Interim Guidelines].

190. *See id.*; *see also* R. ANDREWS, *supra* note 42, at 29 (observing that the interim guidelines "were almost wholly procedural rather than substantive").

posed by a particular project prior to a final decision.¹⁹¹ In addition, the guidelines emphasized the early identification of alternative actions in order to prevent the premature foreclosure of less detrimental options.¹⁹² CEQ was thus laying the groundwork for more effective administrative policing of the NEPA process by giving itself and commenting agencies both the time and information necessary for a thorough critique of an EIS.

The guidelines, however, failed to deal with two crucial aspects of an effective oversight process. Where and how could a commenting agency refer an inadequate EIS or an unsatisfactory project for high-level review and possible resolution?

Congress, fortunately, resolved both problems when it enacted section 309 of the Clean Air Act. Section 309 made EPA and CEQ "full partner[s]" in overseeing the implementation of NEPA.¹⁹³ Although their roles are complementary, each is charged with a separate, discrete task within the oversight process. EPA is the day-to-day watchdog of NEPA compliance, responsible for reviewing and commenting upon all federal actions which have significant environmental impact.¹⁹⁴ This responsibility enables EPA to single out those actions which have particularly harmful effects and refer them to CEQ.¹⁹⁵ CEQ, in turn, is assigned the task of reviewing problem cases which EPA brings to its attention.¹⁹⁶

Section 309, therefore, took full advantage of the respective strengths of these two agencies. EPA, with its larger staff capabilities and regional structure, was and remains well-suited to its role as a central checkpoint for all agency actions presenting a risk of adverse environmental impact.¹⁹⁷ As a much smaller agency, CEQ could never hope to perform that function.¹⁹⁸ On the other hand, CEQ, drawing on both its position as a presidential advisor¹⁹⁹ and its location in the Executive Office of the President,²⁰⁰ possesses the institutional authority to bring considerable pressure to bear on those agencies whose projects have been classified by EPA as environmentally unsatisfactory.²⁰¹

191. CEQ 1970 Interim Guidelines, *supra* note 189, at 7392, § 10. The guidelines also provided that agencies were to elicit the comments of the appropriate state and local agencies. *Id.* § 9.

192. *Id.* § 7(a)(iii).

193. Healy, *supra* note 149, at 50,071.

194. Clean Air Act § 309(a), 42 U.S.C. § 7609(a) (1982).

195. *See id.* § 309(b), 42 U.S.C. § 7609(b) (1982). Such a referral is also made available to the public. *See id.*

196. *See id.*

197. *See* W. RODGERS, *supra* note 160, at 710.

198. *See* Healy, *supra* note 149, at 50,072.

199. *See* NEPA § 204, 42 U.S.C. § 4344 (1982); *see also* Anderson, *supra* note 24, at 248 (describing CEQ's role as an "advisor to the president").

200. NEPA § 202, 42 U.S.C. § 4342 (1982).

201. Ultimately, however, the amount of influence possessed by CEQ depends on the degree

Through the enactment of this remarkably perceptive piece of legislation, Congress created "a formidable administrative team"²⁰² which, theoretically at least, should be capable of both fully monitoring relevant federal projects and ensuring a high degree of agency compliance with the requirements of NEPA. Neither EPA nor CEQ, however, was especially eager to realize the full potential of this powerful oversight arrangement.

Following the enactment of section 309, CEQ issued revised NEPA guidelines in April, 1971.²⁰³ CEQ, however, did not use the opportunity to establish a procedure for receiving or handling environmental referrals from EPA.²⁰⁴ Even the more extensive guidelines issued by CEQ in August, 1973 failed to rectify this glaring omission.²⁰⁵

EPA, meanwhile, seemed in no particular hurry to implement section 309. It was late 1972 before EPA prescribed formal, detailed guidance governing section 309 reviews and referrals.²⁰⁶ Under this scheme, EPA

of support the agency receives from the Chief Executive. *See* RAND & TAWATER, ENVIRONMENTAL REFERRALS AND THE COUNCIL ON ENVIRONMENTAL QUALITY 16-17 (Environmental Law Institute Final Report, Feb., 1986).

202. Healy, *supra* note 149, at 50,071.

203. CEQ, Statements on Proposed Federal Actions Affecting the Environment: Guidelines, 36 Fed. Reg. 7724 (1971) [hereinafter CEQ 1971 Guidelines].

204. *See id.* In the only reference to § 309, CEQ merely quoted this provision and stated that EPA's comments under subsection (a) would be sent to CEQ and the responsible federal agency and would be summarized for the public in a Federal Register notice. *See id.* at 7725-26, § 8.

Nevertheless, the guidelines did guarantee "to the maximum extent practicable" that commenting agencies would have access to draft EISs at least 90 days prior to final agency action and access to final statements at least 30 days before final action. *Id.* at 7726, § 10(b). CEQ thus had provided all commenting agencies, including EPA, with a more adequate time period in which to peruse a proposed agency action. The guidelines, moreover, provided that these two documents had to be made available to the public within the same time periods and that private citizens and organizations could participate in the commenting process. *See id.* For a general discussion of the 1971 revised guidelines, see R. ANDREWS, *supra* note 42, at 33-34.

205. CEQ, Preparation of Environmental Impact Statements: Guidelines, 40 C.F.R. §§ 1500.1-1500.5 (1974) [hereinafter CEQ 1973 Guidelines]. These revised guidelines required agencies merely to submit relevant proposed actions and EISs to EPA for review pursuant to § 309 of the Clean Air Act and § 102(2)(C) of NEPA. *See id.* at § 1500.9(b). The guidelines, furthermore, stated that "where EPA determines that proposed agency action is environmentally unsatisfactory, or where EPA determines that an environmental statement is so inadequate that such a determination cannot be made, EPA shall publish its determination and notify the Council as soon as practicable." *Id.*

The 1973 guidelines were notable, however, for placing some emphasis on NEPA's substantive policy concerns. For example, the guidelines stressed as an initial matter that impact statements are not ends in themselves, but are designed to enable agencies to fulfill the policy objectives of NEPA. *See id.* § 1500.1(a).

206. EPA MANUAL: REVIEW OF FEDERAL ACTIONS IMPACTING THE ENVIRONMENT (1972) [hereinafter EPA REVIEW MANUAL 1972]; *see also* W. RODGERS, *supra* note 160, at 710-11 (commenting on EPA's "slow start" in implementing § 309); Healy, *supra* note 149, at 50,079-80 (discussing the scheme EPA established for performing its § 309 review).

Prior to the promulgation of this formal guidance document, EPA had attempted to fulfill its § 309 responsibilities in a rather informal, ad hoc manner. *See id.* at 50,076-79. The process

would comment on the adequacy of all draft impact statements and also assess the substantive merits of the underlying projects.²⁰⁷ For those statements or projects on which the agency expressed qualms at the draft stage,²⁰⁸ EPA would conduct another evaluation when the final impact statement was received.²⁰⁹ At that point, the agency would decide whether the proposed action or final EIS should be referred to CEQ.²¹⁰ Not until 1975 did EPA acknowledge that it had any obligation to oversee federal actions during the post-EIS period. This revised guidance provided that EPA would monitor certain questionable projects to determine if the responsible agency had acted "in an environmentally protective and sound manner."²¹¹ Neither this guidance document nor the CEQ guidelines, however, provided any mechanism whereby EPA could challenge an agency whose actual project was proceeding in an unsatisfactory way.²¹²

The entire review process was thus effectively limited to an evaluation of how well an agency performed at the procedural stage of NEPA. Did the EIS adequately analyze a project's impact upon the environment? Was the project, as described in the statement, environmentally satisfactory? If an agency's statement passed scrutiny on those two questions, administrative oversight essentially came to an end. At that point, an agency was perfectly free to disregard the EIS and take whatever substantive action it desired. And neither EPA nor CEQ possessed any concrete mechanism for holding an agency accountable for failing to conform its actions to the substantive policies of NEPA.

B. A Move in the Right Direction: The 1978 CEQ Regulations

This discontinuity between means and ends, between adequate impact statements and possibly unsatisfactory results, received no formal govern-

was so informal, in fact, that the only "referral" EPA made during this period (involving the Trans-Alaska oil pipeline) was apparently never received by CEQ. *Id.* at 50,077; *see also* Anderson, *supra* note 24, at 271 (characterizing EPA review as "rather haphazard" at this time).

207. EPA REVIEW MANUAL 1972, *supra* note 206, at ch. 3, ¶ 1. EPA's comments on draft statements would fall into three categories: adequate, insufficient, and inadequate. Comments on the environmental impact associated with a proposal would also fit into three categories: lack of objections, environmental reservations, and environmentally unsatisfactory. *Id.* at ch. 3, ¶ 1(c).

208. This group included draft statements thought insufficient or inadequate as well as projects upon which the agency expressed reservations or which the agency deemed unsatisfactory. *See id.* at ch. 3, ¶ 4(a).

209. *Id.*

210. *Id.* at ch. 3, ¶ 4(c).

211. EPA MANUAL: REVIEW OF FEDERAL ACTIONS IMPACTING THE ENVIRONMENT ch. 2, ¶ 10 (1975) [hereinafter EPA REVIEW MANUAL 1975]. Such follow-up was to occur in situations where EPA, based on its review of a final EIS, had found a project environmentally unsatisfactory, had expressed environmental reservations, or had determined the final statement to be unresponsive to earlier comments. *Id.*

212. *See id.*; CEQ 1973 Guidelines, *supra* note 205.

mental attention until 1978.²¹³ In that year, CEQ, in response to an Executive Order issued by President Carter,²¹⁴ promulgated binding NEPA regulations.²¹⁵ In the preamble to the regulations, CEQ noted that the previous guidelines had been remiss in addressing only the procedural requirements for EISs. As a result of this unfortunate omission, agencies had tended to view an EIS as "an end in itself, rather than a means to making better decisions."²¹⁶ In order to cure this pressing problem, President Carter had authorized CEQ to expand upon the limited scope of the guidelines and address, in regulatory fashion, the relationship between the EIS and agency decisionmaking.²¹⁷

213. The gap between compliance with the procedural means for obtaining cognitive reform—the EIS—and actually achieving cognitive reform in the context of altered patterns of decisionmaking had received some scholarly attention. *See, e.g.,* R. ANDREWS, *supra* note 42, at 157-58; R. LIROFF, *supra* note 24, at 141. (The author's choice of the term "cognitive reform" was heavily influenced by Professor Thomas O. McGarity's use of "cognitive regulatory reform" to describe attempts to change the way in which agencies "address regulatory problems." McGarity, *Regulatory Reform in the Reagan Era*, 45 MD. L. REV. 253, 260 (1986)).

214. Exec. Order 11,991, 3 C.F.R. 123 (1978), *reprinted at* 42 U.S.C. § 4321 app., at 1136 (Supp. I 1977) (amending Exec. Order 11,514, *supra* note 185) [hereinafter Exec. Order 11,991].

Executive Order 11,991 required CEQ to issue regulations, replacing the earlier guidelines, in order to implement § 102(2) of NEPA. *See id.* § 1 (amending Exec. Order 11,514, *supra* note 185, § 3(h)). In addition, the President directed CEQ to provide for the referral to CEQ of conflicts among the agencies concerning the application of NEPA and § 309 of the Clean Air Act "for the Council's recommendation as to their prompt resolution." *Id.*

The President's order, moreover, left no doubt that these regulations are binding upon all federal agencies, except to the extent the regulations are inconsistent with an agency's statutory obligations. *Id.* § 2 (adding § 2(g) to Exec. Order 11,514, *supra* note 185). Thus agencies could no longer rely on a number of earlier judicial opinions which had viewed CEQ's previous guidelines as advisory only. *See* *Sierra Club v. Callaway*, 499 F.2d 982, 990-91 (5th Cir. 1974); *Greene County Planning Board v. Federal Power Comm'n*, 455 F.2d 412, 421 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972). *But cf.* cases stating that CEQ guidelines were entitled to considerable respect: *Sierra Club v. Morton*, 514 F.2d 856, 873 (D.C. Cir. 1975), *rev'd on other grounds*, 427 U.S. 390 (1976); *Environmental Defense Fund v. TVA*, 468 F.2d 1164, 1178 (6th Cir. 1972).

215. CEQ Regulations, 40 C.F.R. § 1500.1-1508.28 (1987). For more general treatment of these regulations, see Fisher, *The CEQ Regulations: New Stage in the Evolution of NEPA*, 3 HARV. ENVTL. L. REV. 347 (1979); McDermott, *Improving NEPA: New Regulations of the Council on Environmental Quality*, 8 B.C. ENVTL. AFFAIRS L. REV. 89 (1979), *reprinted in* 11 LAND USE & ENVT. L. REV. 21 (1980); Yost, *Streamlining NEPA—An Environmental Success Story*, 9 B.C. ENVTL. AFFAIRS L. REV. 507 (1981); Comment, *Putting Bite in NEPA's Bark: New Council on Environmental Quality Regulations for the Preparation of Environmental Impact Statements*, 13 U. MICH. J.L. REF. 367 (1980).

216. Preamble to CEQ Regulations, *supra* note 35, at 55,978.

217. According to CEQ, its authority under the original version of Exec. Order 11,514, *supra* note 185, had been confined to the impact statement procedure found in § 102(2)(C) of NEPA. President Carter's order, however, expanded this authority to include the other planning and decisionmaking provisions found in § 102(2) of NEPA. *See* Preamble to CEQ Regulations, *supra* note 35, at 55,978.

Section 102(2) contains at least two such provisions. First, § 102(2)(A) requires agencies to use an interdisciplinary approach in planning and decisionmaking which may affect the environment. Second, § 102(2)(B) directs agencies to identify and develop procedures which

CEQ, therefore, designed its regulations to "gear means to ends—to ensure that the action-forcing procedures of Section 102(2) of NEPA are used by agencies to fulfill the requirements of the Congressionally mandated policy set out in Section 101 of the Act."²¹⁸ To do this, CEQ devised a number of procedures which would force agencies to link what they learn during the EIS process with their substantive decisions.

The new regulations require agencies to produce a "record of decision" (ROD) for every action involving the preparation of an EIS.²¹⁹ A ROD is a public document consisting of three elements. First, an agency must set forth its final decision.²²⁰ Second, the agency must identify every alternative course of action which the agency had considered and designate which of those alternatives was thought preferable from an environmental perspective.²²¹ The agency must include a discussion of all of the non-environmental factors—technical, economic, or policy concerns—which played a role in the agency's decision.²²² Finally, an agency must state whether every feasible precaution to avoid or lessen environmental harm had been adopted, and if not, why not.²²³

By mandating the preparation of such a decision document, CEQ effectively forces an agency to review its impact statement and to pay particular attention to the most environmentally sound way in which to proceed.²²⁴ If, for some reason, an agency does not choose that course of action, it must articulate some rationale which reveals how the consideration of other

ensure that environmental values are given "appropriate consideration" in agency decision-making. The President certainly has the constitutional authority to see that these provisions, as well as § 102(2)(C), are faithfully executed. *See* U.S. CONST. art. II, § 3. Moreover, he possesses the statutory authority to delegate that authority to CEQ. *See* 3 U.S.C. § 301 (1982); *see also* Preamble to CEQ Regulations, *supra* note 35, at 55,978 (setting forth the constitutional and statutory authority for President Carter's issuance of the Executive Order).

218. Preamble to CEQ Regulations, *supra* note 35, at 55,980.

219. *See* CEQ Regulations, 40 C.F.R. § 1505.2 (1987). This "concise public record of decision" may be incorporated into any other decisionmaking record which an agency generates. *Id.*

220. *Id.* § 1505.2(a).

221. *Id.* § 1505.2(b). CEQ explained that the environmentally preferred alternative is that alternative (or alternatives) "which best promotes the national environmental policy as expressed in Section 101 of NEPA" Preamble to CEQ Regulations, *supra* note 35, at 55,986.

222. *See* CEQ Regulations, 40 C.F.R. § 1505.2(b) (1987).

223. *Id.* § 1505.2(c). Wherever "applicable," an agency shall also adopt and summarize a "monitoring and enforcement program" for necessary mitigation measures. *Id.*

224. This result is reinforced by the existence of two other regulatory requirements. First, CEQ explicitly directed agencies to establish procedures which guarantee that an impact statement and other relevant environmental documents, including comments, "accompany the proposal through existing agency review processes so that agency officials use the statement in making decisions." *Id.* § 1505.1(d). Furthermore, CEQ explicitly prescribed the use of these environmental documents. An agency, therefore, must establish procedures which (a) require a decisionmaker to consider the alternatives presented in the EIS and (b) ensure that the alternatives considered by the decisionmaker "are encompassed by the range of alternatives" presented in the relevant environmental documents. *Id.* § 1505.1(e).

factors tipped the balance in favor of a less desirable alternative.²²⁵ Moreover, an agency must explore measures designed to mitigate any environmental damage that might result from the agency's decision.²²⁶

Having attempted to ensure that agencies integrate environmental values into their decisionmaking process, CEQ then turned its attention to ensuring that agencies actually perform whatever environmentally protective measures are found necessary. The regulations thus require agencies to implement the mitigation and other conditions identified in the EIS or during the review process which are, in fact, adopted in the ROD.²²⁷

CEQ thereby created a rather comprehensive system for relating the information and insights provided by an EIS to actual agency processes for decision and action.²²⁸ The ROD, furthermore, provides other arms of the

225. One commentator has criticized this aspect of the ROD as a watered-down version of what CEQ had originally proposed. See Comment, *supra* note 215, at 401-02. The proposed rule would have required an agency, whenever relevant, to explain "why" other policy concerns "override" the selection of the environmentally preferable alternative. Proposed CEQ Regulations, 43 Fed. Reg. 25,230, 25,240 (1978) (proposing 40 C.F.R. § 1505.2(b)). The final rule, in contrast, forces an agency to "identify and discuss" all the factors including "essential considerations of national policy" that entered into its decision and "state how" those factors affected the decision. CEQ Regulations, 40 C.F.R. § 1505.2(b) (1987). The final rule seems to require the same kind of reasoning as the proposal would have, except that the word "override," to which some commenters had objected, was removed and replaced with less normative language. See Preamble to CEQ Regulations, *supra* note 35, at 55,986.

226. See CEQ Regulations, 40 C.F.R. § 1505.2(c) (1987). This particular requirement dovetails nicely with CEQ's rules pertaining to the preparation of an impact statement. Those rules direct agencies to discuss appropriate mitigation measures with regard to the proposed action and identified alternatives. See *id.* §§ 1502.14(f), 1502.16(h) (1987). The rules define "mitigation" to include:

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- (e) Compensating for the impact by replacing or providing substitute resources or environments.

Id. § 1508.20 (1987).

227. *Id.* § 1505.3 (1987). CEQ left the establishment of a monitoring program to determine whether the contents of the ROD, including mitigation provisions, are implemented to the discretion of the agencies. See *id.* However, CEQ does require agencies to:

- (a) Include appropriate conditions in grants, permits or other approvals.
- (b) Condition funding of actions on mitigation.
- (c) Upon request, inform cooperating or commenting agencies on progress in carrying out mitigation measures which they have proposed and which were adopted by the agency making the decision.
- (d) Upon request, make available to the public the results of relevant monitoring.

Id.

228. As CEQ explained elsewhere in the regulations, the purpose of NEPA, after all, "is not to generate paperwork—even excellent paperwork—but to foster excellent action. The

executive branch, such as EPA and CEQ, as well as Congress and the public with an indication of whether the NEPA process is producing decisions which further national environmental policies.²²⁹

Although the preparation of a record makes agency decisions susceptible to review by EPA and, if necessary, by CEQ, the regulations provide no mechanism for doing so. This omission is curious in view of the tremendous emphasis the Council placed on the record as an "essential" link in the "effective implementation of NEPA."²³⁰ It is also curious because CEQ used the 1978 regulations as an opportunity to create an elaborate process for the referral and review of interagency disputes concerning the implementation of NEPA.

Building upon interim guidance issued in 1977,²³¹ CEQ's regulations establish a precise mechanism for receiving and handling environmental referrals. The regulations recognize EPA's duty to review certain federal actions, including those for which an EIS is prepared, and to refer any action which EPA finds environmentally unsatisfactory.²³² In addition, the regulations authorize referrals from other federal agencies where an agency, after reviewing an EIS, determines that the proposed action involves unacceptable environmental consequences.²³³ CEQ, nevertheless, encourages agencies to avoid the necessity of a referral by entering into consultation with the action agency as early as possible to try to resolve their differences.²³⁴ However, if those efforts prove futile, the regulations require a referral²³⁵ to be delivered to CEQ within twenty-five days after the final EIS is made available to EPA, the commenting agencies, and the public.²³⁶

NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." *Id.* § 1500.1(c) (1987). Therefore, an EIS "shall be used by federal officials in conjunction with other relevant material to plan actions and make decisions." *Id.* § 1502.1 (1987).

229. See Comment, *Implementation of the Environmental Impact Statement*, 88 YALE L.J. 596, 603 (1979).

230. Preamble to CEQ Regulations, *supra* note 35, at 55,985.

231. 42 Fed. Reg. 61,066 (1977) (reprinting a memorandum from the chairman of the Council to all agency heads setting forth interim guidance on the referral of unsatisfactory actions to CEQ). The memorandum was intended to guide the referral process until the adoption of substantive regulations. *Id.* at 61,067.

232. See CEQ Regulations, 40 C.F.R. § 1504.1(b) (1987).

233. See *id.* § 1504.1(c).

234. See *id.* § 1504.2. In addition, CEQ requires an agency to advise the action agency "at the earliest possible time that it intends to refer a matter to the Council unless a satisfactory agreement is reached." *Id.* § 1504.3(a)(1). Such advice must be incorporated into the agency's comments on the draft EIS if the statement is adequate enough to allow an assessment of the project's acceptability. *Id.* § 1504.3(a)(2).

235. In deciding whether to refer a particular project, the regulations urge an agency to evaluate the "potential adverse environmental impacts" from six perspectives:

- (a) Possible violation of national environmental standards or policies.
- (b) Severity.

The entire referral process, consequently, revolves around the merits of a final impact statement and the action it proposes.²³⁷

Upon receiving such a pre-decisional referral and any response from the action agency,²³⁸ CEQ may take one or more of a number of actions. The Council may, for example, consult with the concerned agencies for the purpose of mediation, convene public meetings, issue findings and recommendations, or even submit the matter to the President.²³⁹ On the other hand, CEQ may simply drop the matter if it determines that the issue presented "is not one of national importance"²⁴⁰

Between 1974 and 1985,²⁴¹ a total of twenty-two referrals was made to CEQ.²⁴² Most of these referrals, fourteen in fact, were filed by EPA, while

(c) Geographical scope.

(d) Duration.

(e) Importance as precedents.

(f) Availability of environmentally preferable alternatives.

Id. § 1504.2.

236. *Id.* § 1504.3(b). Unless the action agency grants an extension of this time period, the Council will refuse to entertain a late referral. *Id.*

The referral must contain a copy of a letter from the head of the referring agency to the action agency informing that agency of the referral and requesting the deferral of action until the Council acts. *Id.* § 1504.3(c)(1). The letter must set forth a statement of the agency's rationale, incorporating references to supporting factual evidence, for finding the project environmentally unsatisfactory. *Id.* § 1504.3(c)(2). The statement also must include, inter alia, the identification of any environmental requirements or policies which the project would violate, *id.* § 1504.3(c)(2)(ii), a finding as to whether the referral raises an issue of "national importance," *id.* § 1504.3(c)(2)(iv), and "recommendations as to what mitigation alternative, further study, or other course of action (including abandonment of the matter) are necessary to remedy the situation," *id.* § 1504.3(c)(2)(vi).

237. See, e.g., CEQ Forty Most Asked Questions, *supra* note 34, at 18,036 (stating in the answer to question 33a that the "Council's referral procedure is a *pre-decision* referral process for interagency disagreements") (emphasis in original).

238. The action agency has 25 days within which to respond to the referral. CEQ Regulations, 40 C.F.R. § 1504.3(d) (1987). CEQ may grant the action agency an extension provided it gives an "assurance that the matter will not go forward in the interim." *Id.*

239. See *id.* § 1504.3(f)(2), (3), (6), (7).

240. *Id.* § 1504.3(f)(4). The Council may also find that "the process of referral and response has successfully resolved the problem," *id.* § 1504.3(f)(1), or return the matter to the concerned agencies for further negotiation, see *id.* § 1504.3(f)(5).

241. All nine referrals filed prior to 1978 were from EPA. See COUNCIL ON ENVTL. QUALITY, FIFTEENTH ANN. REP. 527 (1984) [hereinafter CEQ 15th ANNUAL REPORT]. Those filed before the issuance of interim CEQ guidance in 1977, see *supra* note 231 and accompanying text, were presumably handled by CEQ on an informal, case-by-case basis, see *Current Developments*, 8 Env't Rep. (BNA) 582 (Aug. 19, 1977).

242. See CEQ 15th ANNUAL REPORT, *supra* note 241, at 526-28. Since 1985, CEQ has received at least one additional referral. See *Department of Housing and Urban Development—Independent Agencies Appropriations for 1989, Pt. 1: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 100th Cong., 2d Sess. 686-87 (1988) (describing the recent referral from the Department of the Interior challenging the Navy's proposal to establish a Marine air facility near the Cape Lookout National Seashore in North Carolina) [hereinafter *Budget Hearings 1988*].

the Department of the Interior was responsible for six more.²⁴³ The range of issues presented to CEQ²⁴⁴ have run from the preservation of national parks, forests, and seashores²⁴⁵ to the protection of air and water resources.²⁴⁶ The concern that has most frequently arisen, however, has been the preservation of wetlands—from mangrove swamps to bottomland hardwoods.²⁴⁷

The referral process has often succeeded in prompting serious negotiations between the contending agencies.²⁴⁸ During these negotiations, CEQ has sometimes assumed the role of mediator, assisting the parties, for example, in narrowing the scope of issues in dispute.²⁴⁹ At other times, or after attempts at mediation have failed, the Council has become an advocate, issuing recommendations designed to achieve a better accommodation of environmental values.²⁵⁰ Perhaps surprisingly, the action agencies have generally accepted the recommendations of the Council even though they are not binding.²⁵¹ This "clout" has resulted from the Council's position in the Executive Office of the President²⁵² and from the perception that the Council possesses a highly competent and objective staff.²⁵³

The formal referral process has thus been a relatively effective mechanism for resolving predecisional disputes in an environmentally sensitive fashion. While it remains a seldom-used tool, considering the thousands of proposals

243. See CEQ 15th ANNUAL REPORT, *supra* note 241, at 527-28. The Department of the Interior also joined EPA in referring a dispute involving an airport expansion in Jackson Hole, Wyoming. See *id.* at 528, 551. The Department of Defense and the Advisory Council on Historic Preservation each filed one referral. See *id.* at 528.

244. For a brief summary of these referrals, see *id.* at 528-60; RAND & TAWATER, *supra* note 201, 22 app.

245. EPA and the Department of the Interior, for example, objected to an expansion of an airport in Jackson Hole, Wyoming, due to noise impacts on the Grand Teton National Park. See RAND & TAWATER, *supra* note 201, 22 app. at 32-33. EPA also referred a proposal to issue phosphate mining leases in the Osceola National Forest in Northern Florida, see *id.* 22 app. at 1-3, and the Department of the Interior opposed a beach restoration plan due, in part, to adverse impacts upon the Fire Island National Seashore, see *id.* 22 app. at 21-22.

246. For instance, EPA referred a proposal to permit a marine terminal at the mouth of the Wando River in South Carolina because the project would, among other things, degrade water quality, see *id.* 22 app. at 13-14, and EPA's objection to the Westside Highway (Westway) in New York City grew out of the use of a "flawed" air quality model, see *id.* 22 app. at 9-10.

247. A total of nine referrals involved wetlands, at least in part. See *id.* 22 app. at 7, 11-12, 13-14, 15-16, 17-18, 23-25, 26-29, 34-36, 44-46. These referrals included EPA's opposition to the issuance of dredge and fill permits which would have authorized the destruction of 2,200 acres of mangrove habitat at Marco Island, Florida, *id.* 22 app. at 7, and the Department of the Interior's referral of the Tennessee-Tombigbee Waterway for an "inadequate" plan to mitigate the loss of 34,000 acres of hardwood wetlands, *id.* 22 app. at 44-46.

248. See *id.* at 12.

249. See *id.* Through the efforts of CEQ, the heads of the respective agencies often became aware for the first time that a particular controversy existed. *Id.*

250. See *id.* at 12-15.

251. See *id.* at 15.

252. See *id.* at 16.

253. See *id.* at 15-18.

that lie within its potential ambit,²⁵⁴ numbers alone belie its significance. The mere possibility of an eventual referral has encouraged moderation and compromise. Regardless of whether agencies are trying to avoid adverse publicity or scrutiny by CEQ (and, perhaps, by White House staffers),²⁵⁵ the spectre of a referral has indeed induced action agencies to consider more seriously the objections posed by commenting agencies and even to accept more environmentally acceptable alternatives.²⁵⁶ Agencies, however,

254. *See id.* at 7. The fact that CEQ may refuse to consider a referral that fails to present a matter of "national importance," *see supra* note 240 and accompanying text, has undoubtedly contributed to the low number of referrals. *See RAND & TAWATER, supra* note 201, at 7. Although CEQ has seemingly used the "national importance" criterion to weed out referrals presenting politically charged, but environmentally significant issues, *see generally id.* 22 app. at 42-43 (discussing the referral of the Presidential Parkway project in Atlanta, Georgia), the standard, if properly applied, appears an appropriate method for husbanding the limited resources of CEQ. *Cf. id.* at 7 (speculating on the rationale for "this important limitation on CEQ jurisdiction").

An agency may also be reluctant to press a referral against a project with strong support within the administration. *See generally* 2 NATIONAL RESEARCH COUNCIL, DECISION MAKING IN THE ENVIRONMENTAL PROTECTION AGENCY 153 (1977) (discussing EPA's approach to the then-proposed liquid metal fast breeder reactor).

255. In one referral, CEQ explicitly threatened to involve the White House if the action agency did not revise its proposal. *See RAND & TAWATER, supra* note 201, 22 app. at 21-22 (summarizing the referral of the Corps of Engineers' proposal to rebuild the beach along the southern coast of Long Island).

256. *See id.* at 8, 14 (basing these conclusions upon extensive interviews with individuals who have been involved in the referral process); *see also* 2 NATIONAL RESEARCH COUNCIL, *supra* note 254, at 153 (observing that EPA oversight has served "to deter other federal agencies from making only a token effort toward environmental assessment"). The prophylactic value of a threatened referral is well illustrated by one example with which the author had some involvement during his service as a regional lawyer with EPA.

The Army Corps of Engineers had initially refused to prepare an EIS for the issuance of a permit which was a necessary precondition to the construction of a 30,000 barrel-per-day oil refinery near Georgetown, South Carolina. ARMY CORPS OF ENGINEERS, FINDING OF NO SIGNIFICANT IMPACT, APPLICATION BY CAROLINA REFINING AND DISTRIBUTING COMPANY TO INSTALL A SUBAQUEOUS PIPELINE ACROSS THE SAMPIT RIVER, NEAR GEORGETOWN, SOUTH CAROLINA (1983). Concerned by the refinery's "potential adverse impact on water quality and the ecology of Winyah Bay," EPA Region IV prepared a referral package seeking the preparation of an EIS for this project. *See* Memorandum from Charles R. Jeter, Regional Administrator, to Acting Director of EPA's Office of Federal Activities (May 2, 1983) (on file with author). Winyah Bay is a large, shallow estuary which is surrounded by undeveloped marshes and a number of wildlife sanctuaries. *See* EPA, SUPPORT DOCUMENT FOR THE REFERRAL OF THE CHARLESTON CORPS OF ENGINEERS' DECISION NOT TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT ON CAROLINA REFINING AND DISTRIBUTING COMPANY'S GEORGETOWN REFINERY 1-2 (undated). (For a delightful mystery story set along the pristine shores of Winyah Bay, *see* Elliott Roosevelt's *Murder at Hobcaw Barony* (1986)).

Prior to the delivery of the referral package to CEQ, however, the Corps of Engineers relented and began to prepare a full-blown EIS. *See* 49 Fed. Reg. 47,924 (1984) (recounting the Memorandum of Agreement between EPA and the Corps concerning the preparation of an EIS for this proposed project). When the Corps issued its final EIS announcing its intention to issue the necessary permit, EPA again threatened to refer the matter to CEQ, citing among other things, the risk of oil spills in the bay. *See id.* The Corps eventually backed down once more and, this time, denied the permit because Winyah Bay is, in the words of the Corps, a "truly unique environment" worthy of preservation. *Current Developments*, 15 Env't Rep. (BNA) 1478-79 (Jan. 11, 1985).

do not face the sobering prospect of a referral when it comes to making final decisions.

The referral system, as established by CEQ, is largely geared to the production of better environmental information documents rather than better decisions. Once an agency has identified an environmentally satisfactory proposal within its final EIS, the threat of referral ends²⁵⁷ despite the fact that no agency is bound to adopt that particular proposal in its ROD.²⁵⁸ Consequently, neither EPA nor any other federal agency possesses a formal mechanism for challenging the environmental rectitude of an action agency's final decision. Although this result may well be appropriate for agencies that are merely authorized to comment on an EIS,²⁵⁹ EPA's duties under section 309 of the Clean Air Act go beyond the scope of an environmental impact statement.²⁶⁰

EPA, in fact, has continued to acknowledge at least some responsibility to review how well agencies perform after filing a final EIS. Under revised guidelines issued in 1984,²⁶¹ EPA may, on a selective basis,²⁶² monitor an agency's record of decision to determine whether the agency has incorporated

257. Referrals must be filed within 25 days after a final EIS becomes available. CEQ Regulations, 40 C.F.R. § 1504.3(b) (1987). The ROD setting forth the agency's final decision, however, may not be issued until the thirtieth day after the final EIS becomes available. *See id.* § 1506.10(b). Even if an action agency has granted an extension of time for another agency to process a referral, the ROD may not be issued until the extension has expired. CEQ Forty Most Asked Questions, *supra* note 34, at 18,036 (answer to question 33b). It is, therefore, impossible to file a referral following the issuance of a ROD. *See id.* (stating that no referrals may be made once a ROD has been issued).

258. *See supra* text accompanying notes 219-25.

259. *See* NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1982).

260. *See infra* text accompanying notes 337-44.

261. EPA, POLICY AND PROCEDURES FOR THE REVIEW OF FEDERAL ACTIONS IMPACTING THE ENVIRONMENT (1984) [hereinafter EPA REVIEW POLICY AND PROCEDURES 1984].

This guidance document revised, to a certain extent, the agency's previous system for reviewing and rating draft EISs. *See supra* note 207 and accompanying text (describing the system which was subsequently incorporated into the EPA REVIEW MANUAL 1975, *supra* note 211, at ch. 3, ¶ 1(c)). With regard to environmental impact, the agency will place a project, as described in the draft statement, in one of four categories: (1) lack of objections, (2) environmental concerns, (3) environmental objections, or (4) environmentally unsatisfactory. EPA REVIEW POLICY AND PROCEDURES 1984, *supra*, at ch. 4, ¶ 4(a). The agency also will determine whether the draft statement (1) is adequate, (2) contains insufficient information, or (3) is inadequate. *Id.* at ch. 4, ¶ 4(b).

Whereas EPA's prior practice was to review final EISs only for certain projects, *see supra* notes 208-09 and accompanying text (discussing the practice which was later adopted by the EPA REVIEW MANUAL 1975, *supra* note 211, at ch. 3, ¶ 4(a)), the current guidance suggests that EPA will review all final statements, *see* EPA REVIEW POLICY AND PROCEDURES 1984, *supra*, at ch. 6. EPA, however, reserves "detailed review[s]" for projects rated environmentally objectionable or environmentally unsatisfactory at the draft stage and for statements which were rated inadequate in draft form. *Id.* at ch. 6, ¶ 1.

262. EPA REVIEW POLICY AND PROCEDURES 1984, *supra* note 261, at ch. 7, ¶ 1 (setting forth EPA policy), ¶ 3(a) (stating that EPA personnel "should" review a ROD for final impact statements "on which the EPA has expressed environmental objections, and/or those where the EPA has negotiated mitigation measures or changes in project design").

any mitigation measures previously agreed upon with EPA.²⁶³ Where an action agency fails to incorporate agreed upon mitigation in its decision, EPA's recourse is to bring the problem to the action agency's attention.²⁶⁴

The limitations of EPA's post-EIS procedures are obvious. Not only is EPA review totally discretionary, but it focuses upon one narrow issue: Has the action agency executed its mitigation agreement with EPA? Moreover, if the action agency proves recalcitrant, EPA lacks the one tool that has proven effective in encouraging agencies to compromise—the threat of a formal referral to the CEQ. Neither EPA nor CEQ, therefore, have fully met their respective obligations under section 309 of the Clean Air Act.

III. THE LIMITS OF JUDICIAL REVIEW

While NEPA represents an ambitious attempt to reform and redirect federal planning and decisionmaking, the Act does not preempt the decisionmaking authority possessed by federal agencies. The Act, however, does seek to ensure that those decisions are fully informed and guided by generally stated environmental values. The ultimate balancing of those environmental values with other economic or social values is a matter delegated by Congress to the good faith and expertise of the executive branch.²⁶⁵

The federal judiciary has thus been reluctant to review the substantive merits of federal decisions which are "informed" by adequate EISs. As long as an agency has complied with the procedural requirements of NEPA, the courts appear an unlikely source of support for a litigant who challenges the environmental wisdom of a particular agency decision. Such a litigant, however, does possess two avenues of attack, both procedural, for problems that might arise after the filing of a satisfactory EIS.

Although a project's description in an EIS cannot be viewed as binding, any mitigation measures adopted in an agency's ROD appear to be enforceable commitments. Moreover, if the agency's actual action diverges significantly from the picture of the proposed action contained in the EIS, a

263. *Id.* at ch. 7, § 2(a)(2). As a follow-up to such a review, EPA personnel are instructed to "ensure" that the action agency "has included all agreed upon [mitigation] measures as conditions in grants, permits, or other approvals, where appropriate." *Id.* at ch. 7, § 2(a)(3). Furthermore, EPA staff is encouraged, where resources permit, "to assess the level of compliance . . . of Federal agency mitigation measures." *Id.* at ch. 7, § 2(c).

264. *Id.* at ch. 7, § 3(b). If a problem remains unresolved after bringing it to the attention of the action agency, the matter "should be coordinated" with that agency's headquarters and, "if appropriate," with CEQ. *Id.*

EPA's guidance is silent as to any response for a situation in which an action agency either fails to directly implement agreed-upon mitigation or fails to impose agreed-upon mitigation as conditions of grants, permits, or other approvals. *See id.* at ch. 7.

265. *See, e.g.,* L. CALDWELL, *supra* note 1, at 1; Note, *EIS Supplements for Improperly Completed Projects: A Logical Extension of Judicial Review under NEPA*, 81 MICH. L. REV. 221, 223-24 (1982).

court might well order the preparation of a supplemental EIS. Both remedies, of course, suffer from the fact that they are procedural in nature. A court will neither force an agency to incorporate appropriate mitigation in a ROD nor compel an agency, following the preparation of a supplement, to adopt a more environmentally satisfactory course of action. In addition, a project modification which is less than significant or, perhaps in some circuits, less than sweeping, will not even trigger the duty to supplement an existing EIS.

A. *The Substantive Enforcement of NEPA*

The federal courts have long made a crucial distinction between the procedural obligations imposed by NEPA and the Act's substantive component. In *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*,²⁶⁶ the Court of Appeals for the District of Columbia held that the procedural duties of section 102 were subject to a "strict standard of compliance."²⁶⁷ In contrast, the court construed the substantive policy of NEPA as "flexible" leaving "room for a responsible exercise of discretion."²⁶⁸ Judge Skelly Wright, nevertheless, indicated in dictum that this discretion was not unfettered. Consequently, a reviewing court "probably cannot reverse a substantive decision on its merits, under section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values."²⁶⁹ A number of appellate courts subsequently echoed the suggestion in *Calvert Cliffs'* that there was indeed some room for substantive judicial review of an agency's actual decision.²⁷⁰

The Supreme Court, however, has apparently laid this notion to rest. In *Strycker's Bay Neighborhood Council, Inc. v. Karlen*,²⁷¹ the Court held that

266. 449 F.2d 1109 (D.C. Cir. 1971).

267. *Id.* at 1112.

268. *Id.*

269. *Id.* at 1115.

270. See, e.g., *Environmental Defense Fund, Inc. v. Corps of Eng'rs of the United States Army*, 492 F.2d 1123, 1139-40 (5th Cir. 1974) (decided on other grounds); *Sierra Club v. Froehlke*, 486 F.2d 946, 953 (7th Cir. 1973) (concluding that the agency's decision was neither arbitrary nor capricious); *Environmental Defense Fund, Inc. v. Corps of Eng'rs of the United States Army*, 470 F.2d 289, 297-301 (8th Cir. 1972) (same), *cert. denied*, 412 U.S. 931 (1973). *Contra Lathan v. Brinegar*, 506 F.2d 677, 693 (9th Cir. 1974); *National Helium Corp. v. Morton*, 455 F.2d 650, 656 (10th Cir. 1971).

This issue prompted lively discussion in the legal literature. See, e.g., Briggs, *NEPA as a Means to Preserve and Improve the Environment—The Substantive Review*, 15 B.C. INDUS. & COM. L. REV. 699 (1974); Cohen & Warren, *Judicial Recognition of the Substantive Requirements of the National Environmental Policy Act of 1969*, 13 B.C. INDUS. & COM. L. REV. 685 (1972); Note, *The Least Adverse Alternative Approach to Substantive Review under NEPA*, 88 HARV. L. REV. 735 (1975).

271. 444 U.S. 223 (1980) (per curiam). Prior to the Second Circuit's decision, no court had invalidated an agency decision as arbitrary or capricious under NEPA. J. BONINE & T. MCGARITY, *supra* note 2, at 207.

the Second Circuit had erred in setting aside an administrative decision for failing to give certain environmental factors controlling weight.²⁷² In doing so, the Court stated that while NEPA establishes "significant substantive goals for the Nation," the judicially enforceable duties that it imposes upon agencies are "essentially procedural."²⁷³ A reviewing court, therefore, may not require an agency to "elevate environmental concerns over other appropriate considerations."²⁷⁴ Rather, as long as an agency has complied with NEPA's procedural requirements, a court "cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.'"²⁷⁵

The Court thus relegated judicial review under NEPA to "the essentially mindless task of determining whether an agency 'considered' environmental factors even if that agency may have effectively decided to ignore those factors in reaching its conclusion."²⁷⁶ Despite the breadth of the Court's

272. *Strycker's Bay*, 444 U.S. at 226-28.

273. *Id.* at 227 (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978)).

274. *Id.*

275. *Id.* at 227-28 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)). The Court's conclusion may well be appropriate since NEPA provides no real guidance for weighing environmental values with other essential policy goals. See *supra* note 28 and accompanying text; Comment, *supra* note 229, at 602. After all, § 101 declares that federal agencies must "use all practicable means, consistent with other essential considerations of national policy," to further the environmental goals set forth in the Act. NEPA § 101(b), 42 U.S.C. § 4331(b) (1982) (emphasis added).

276. *Strycker's Bay*, 444 U.S. at 231 (Marshall, J., dissenting). Some commentators, on the other hand, have argued that the Supreme Court did not eliminate the possibility of substantive judicial review to determine whether an agency's decision was arbitrary or capricious. See Liebesman, *The Council on Environmental Quality's Regulations to Implement the National Environmental Policy Act—Will They Further NEPA's Substantive Mandate?*, 10 *Envtl. L. Rep. (Envtl. L. Inst.)* 50,039, 50,041-42 (1980); Comment, *Charting the Boundaries of NEPA's Substantive Mandate: Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 10 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,039, 10,043-44 (1980). These commentators have relied upon a footnote in *Strycker's Bay* which states that had the Second Circuit found the agency's decision arbitrary, plenary review might have been available. See *Strycker's Bay*, 444 U.S. at 228 n.2. Instead, the Second Circuit had erred by elevating "environmental concerns over other, admittedly legitimate, considerations." *Id.*

Such a reading of *Strycker's Bay* appears strained. If the Court was referring to the question of substantive NEPA review, it was wrong. The Second Circuit had concluded that the agency had acted arbitrarily by selecting an alternative which would present adverse and avoidable environmental impacts. See *Karlen v. Harris*, 590 F.2d 39, 43-44 (2d Cir. 1978), *rev'd sub nom. Strycker's Bay*, 444 U.S. 223; see also Goldsmith & Banks, *supra* note 24, at 10-11 (arguing to the same effect). Furthermore, if the Court had really believed that room existed for review based upon the arbitrary and capricious standard, "giving environmental concerns no more, but no less, weight than they deserve," *id.* at 11, the Court should have remanded the case for further findings. In fact, the Court may have been referring to the district court's holding that the agency's implementation of the procedural requirements of § 102 was not arbitrary, a holding which was left undisturbed by the Second Circuit. See *Trinity Episcopal School Corp. v. Harris*, 445 F. Supp. 204, 220 (S.D.N.Y. 1978), *rev'd sub nom. Karlen v. Harris*, 590 F.2d 39 (1978), *rev'd sub nom. Strycker's Bay*, 444 U.S. 223. Until such time as the Court has an opportunity to clarify this ambiguity, the author chooses to rely upon Justice Marshall's characterization of *Strycker's Bay* and the clear language of its text.

approach, it may not have precluded a very narrow form of substantive review. At least one appellate opinion rendered after *Strycker's Bay* has held that an agency, in making its substantive decision, must consider the environmental consequences of its action in "good faith."²⁷⁷ Good faith consideration alone, however, does not necessarily yield a decision which reflects an appropriate weighing of environmental values.²⁷⁸ Provided an agency has disclosed and "considered" the environmental harm its project may cause, it appears free to unleash the resulting damage without the troublesome prospect of probing judicial inquiry.²⁷⁹

B. Enforcing Agency "Commitments"

It should come as no surprise, considering the judicial reluctance to review an agency's substantive decision, that the courts have refused to enforce "commitments" found in an EIS.²⁸⁰ However misleading representations contained in an EIS may seem when viewed in light of actual agency

277. *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980) (holding specifically that a "court should only assure itself that the agency has given good faith consideration to the environmental consequences of its actions and should not pass judgment on the balance struck by the agency among competing concerns"). For cases stating that substantive review is limited to a determination of whether there had been good faith consideration of environmental consequences, see *Wade v. Lewis, Inc.*, 561 F. Supp. 913, 946 (N.D. Ill. 1983); *Pennsylvania Protect Our Water and Envtl. Resources, Inc. v. Appalachian Regional Comm'n*, 574 F. Supp. 1203, 1212-13 (M.D. Pa. 1982); *Citizens Comm. Against Interstate Route 675, Inc. v. Lewis*, 542 F. Supp. 496, 530-31 (S.D. Ohio 1982).

278. Other courts have held that the "consideration" required by *Strycker's Bay* may be satisfied by completion of an adequate EIS. See *Wade v. Goldschmidt*, 673 F.2d 182, 184-85 (7th Cir. 1982); *Save Lake Washington v. Frank*, 641 F.2d 1330, 1334 (9th Cir. 1981). See also Weinstein, *Substantive Review under NEPA after Vermont Yankee IV*, 36 SYRACUSE L. REV. 837, 852-53 (1985) (concluding that these courts, while purporting to review the merits, never actually reach the merits).

279. An agency would likely be able to demonstrate good faith substantive consideration of environmental consequences by producing the agency's ROD. That document, if properly done, will specify all of the alternatives considered by the agency, including the environmentally preferable one, and will discuss how various policy factors entered into its ultimate decision. CEQ Regulations, 40 C.F.R. § 1505.2(b) (1987); see *supra* notes 219-23 and accompanying text.

280. See *Noe v. Metropolitan Atlanta Rapid Transit Authority*, 644 F.2d 434, 435 (5th Cir. 1981) (holding that NEPA does not create a private right of action to enforce noise levels specified in an EIS), *cert. denied*, 454 U.S. 1126 (1981); *City of Blue Ash v. McLucas*, 596 F.2d 709, 712-13 (6th Cir. 1979) (holding that a cause of action does not exist to enjoin a federal agency from breaching a provision in an EIS); *Mountainbrook Homeowners Ass'n v. Adams*, 492 F. Supp. 521, 529 (W.D.N.C. 1979) (holding that plaintiffs cannot maintain a cause of action to enforce an EIS provision indicating that a pile of debris would be contoured and seeded), *aff'd mem.*, 620 F.2d 294 (4th Cir. 1980). See generally, Comment, *Enforcing the "Commitments" Made in Impact Statements: A Proposed Passage Through a Thicket of Case Law*, 10 Envtl. L. Rep. (Envtl. L. Inst.) 10,153 (1980) (discussing and criticizing this line of cases).

performance,²⁸¹ the fact remains that those representations do not amount to enforceable duties. As the CEQ regulations amply demonstrate, an EIS is simply a planning document which is intended to inform the ultimate decisionmaker.²⁸² Therefore, any attempt to enforce a mitigation measure or any other condition found in an EIS is, in reality, an effort to force a particular decision upon an agency by transforming a planning tool into a final decision. If any document generated during the NEPA process could give rise to such an action for enforcement, it would have to be an agency's ROD.

While CEQ has expressed its belief that "the terms of a ROD are enforceable by . . . private parties,"²⁸³ the regulations promulgated by CEQ reveal that the enforceable duties arising from a record of decision are more circumscribed. The regulations do not direct an agency to implement every aspect of a decision. Rather, CEQ chose only to require an agency to perform the "mitigation . . . and other conditions" identified during the EIS process and adopted in the agency's decision.²⁸⁴ A court, consequently, could find a failure to implement such mitigation a breach of an agency's legal duty and order the agency to comply.²⁸⁵

281. *City of Blue Ash*, 596 F.2d 709, involved an especially egregious example of an agency turning its back on an impact-reducing representation contained in its EIS. The Federal Aviation Administration (FAA) had prepared an EIS for its funding of an airport expansion in suburban Cincinnati. The EIS indicated that, due to public opposition, jet aircraft would be barred from using the renovated facility. Soon after the project was completed, however, the FAA reversed itself and declared that certain types of jets would, in fact, be granted access to the airport. *Id.* at 710-11.

282. See *supra* notes 216-28 and accompanying text; see also Comment, *supra* note 215, at 402 n.206 (stating that an EIS is an information document which "focuses on the process of assessment," whereas a decision document "focuses on the process of choice").

283. CEQ Forty Most Asked Questions, *supra* note 34, at 18,037 (answer to question 34d). Since this document was not promulgated as a substantive rule, it is not binding law. See, e.g., *Louisiana v. Lee*, 758 F.2d 1081, 1083 (5th Cir. 1985), *cert. denied*, 475 U.S. 1044 (1986); *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 682 (D.C. Cir. 1982). An agency's interpretation of its own regulation, however, is entitled to substantial deference "unless it is plainly erroneous or inconsistent with the regulation." *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (quoting *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1944)). See also *Cabinet Mountains*, 685 F.2d at 682-83 (finding a portion of the Forty Questions unpersuasive because, in its view, CEQ had strayed from the realm of interpretation and had attempted to impose requirements not found in the NEPA regulations).

284. CEQ Regulations, 40 C.F.R. § 1505.3 (1987); see *supra* note 227 and accompanying text.

285. Under the Administrative Procedure Act, a federal court possesses the authority to "hold unlawful" agency action which is "not in accordance with law," 5 U.S.C. § 706(2)(A) (1982), and to "compel agency action unlawfully withheld or unreasonably delayed," *id.* § 706(1).

CEQ has taken this position as well stating that "A Record of Decision can be used to compel compliance with or execution of the mitigation measures identified therein." CEQ Forty Most Asked Questions, *supra* note 34, at 18,037 (answer to question 34d). To facilitate the enforcement of these requirements, the CEQ regulations instruct an agency to include the details of the mitigation measures as conditions of funding, permitting or granting of other

An agency, however, has no duty to adopt mitigation measures or other impact reducing conditions in its ROD.²⁸⁶ As a result, a potential litigant may find little to enforce. Moreover, a citizen will likely be unaware of whether an agency has ever performed its obligations to mitigate environmental damage.²⁸⁷ And even if one becomes aware of an implementation failure, the discovery may come so late in the process that a suit cannot be brought until after the project has been completed.²⁸⁸ In such a case, a court might be inclined to dismiss the action for mootness²⁸⁹ or to deny injunctive relief on account of laches.²⁹⁰

C. Supplemental Impact Statements

The entire efficacy of the EIS process is called into question when changes are made to a project after the publication of a final impact statement.

approvals when a private party or a subordinate governmental entity is actually responsible for the action. See CEQ Regulations, 40 C.F.R. § 1505.3(a)-(b) (1987). However, if the federal agency is to carry out the project, the Forty Questions state that "the Record of Decision should delineate the mitigation . . . measures in sufficient detail to constitute an enforceable commitment, or incorporate by reference the portions of the EIS that do so." CEQ Forty Most Asked Questions, *supra* note 34, at 18,036-37 (answer to question 34c).

286. The regulations merely provide that a ROD must "[s]tate whether all practicable means to avoid or minimize environmental harm . . . have been adopted, and if not, why they were not." CEQ Regulations, 40 C.F.R. § 1505.2(c) (1987). That language certainly does not suggest a mandatory duty to adopt appropriate mitigation in a record of decision. See Comment, *supra* note 229, at 603-04 (discussing the identical provision in the proposed regulations). Cf. Comment, *supra* note 215, at 398 (attempting to show that it is unclear whether or not the regulations impose a duty to adopt mitigation).

287. Cf. Note, *supra* note 265, at 229 (suggesting the difficulties involved in monitoring post-EIS modifications to a particular project).

288. Cf. *id.* (discussing EIS enforcement cases).

289. A number of courts have declared NEPA actions moot where a challenged project has been largely or entirely completed. See, e.g., *National Wildlife Fed'n v. Appalachian Regional Comm'n*, 677 F.2d 883, 891-92 (D.C. Cir. 1981) (holding that post completion relief "would be a vain attempt to inform decisionmaking past"); *Florida Wildlife Fed'n v. Goldschmidt*, 611 F.2d 547, 549 (5th Cir. 1980) (holding that a court cannot "undo what has already been done"); *Friends of the Earth, Inc. v. Bergland*, 576 F.2d 1377, 1379 (9th Cir. 1978) (same). In many cases, however, mitigation could be performed without the necessity of undoing what has been done. For example, an agency could be ordered to fulfill its commitment to acquire off-site wetlands to replace those destroyed by the construction of a dam or canal. In such an instance, a plaintiff's claim is not truly moot. Post-completion remedies, moreover, may be available where an agency has acted in bad faith. See *Richland Park Homeowners Ass'n v. Pierce*, 671 F.2d 935, 938 (5th Cir. 1982); *Ogunquit Village Corp. v. Davis*, 553 F.2d 243, 246 (1st Cir. 1977).

290. Laches could be applied if it were demonstrated that there was "a delay in asserting a right or claim, that the delay was not excusable and that there was undue prejudice to the party against whom the claim is asserted." *Ecology Center of Louisiana, Inc. v. Coleman*, 515 F.2d 860, 867 (5th Cir. 1975); see also *Michigan v. City of Allen Park*, 501 F. Supp. 1007, 1016-17 (E.D. Mich. 1980); *East 63d Street Ass'n v. Coleman*, 414 F. Supp. 1318, 1330 (S.D.N.Y. 1976). On the other hand, some courts have indicated that the defense of laches is not altogether favored in the context of NEPA litigation. See, e.g., *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 854-55 (9th Cir. 1982); *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314, 1324 (8th Cir. 1974); *Watershed Associates Rescue v. Alexander*, 586 F. Supp. 978, 984-86 (D. Neb. 1982); see also D. MANDELKER, *supra* note 9, at § 4:26.

Such changes frequently occur due to the passage of time and the difficulties faced by an agency when confronted with the actual construction of a large, complex project.²⁹¹ Such changes may also result from the temptation to promise more in an EIS—mitigation measures, for instance—than the agency really intends to implement in order to defuse public or governmental criticism.²⁹² Since an agency cannot be compelled to abide by its EIS “commitments,” a litigant concerned about a project modification is left with one possible option: seek a supplemental environmental statement.

The text of NEPA makes no reference to such a supplement. For a number of years, however, CEQ guidance indicated and the courts held that an agency could, if it so desired, supplement an EIS in order to consider important project changes or significant new information.²⁹³ Some agencies even went so far as to impose an obligation upon themselves to produce a supplement,²⁹⁴ a duty which the courts did not hesitate to enforce.²⁹⁵ In 1978, however, CEQ removed the matter from the discretion of individual agencies and mandated the preparation of supplemental EISs in certain specific cases.²⁹⁶

The CEQ regulations require a supplement in two situations: first, where an agency has made “substantial changes in the proposed action” which are relevant to its environmental impact,²⁹⁷ and, second, where “[t]here are significant new circumstances or information” concerning the environmental aspects of a project.²⁹⁸ As a general matter, agencies must prepare, circulate for comment, and file a supplement in the same manner as a draft and

291. See *Association Concerned About Tomorrow, Inc. v. Dole*, 610 F. Supp. 1101, 1108 (N.D. Tex. 1985); Note, *supra* note 265, at 228; Comment, *Supplements to Environmental Impact Statements: Implementation of the Standards Set by the Council on Environmental Quality*, 35 ME. L. REV. 111, 116 (1983).

292. See Comment, *supra* note 280, at 10,153. On the other hand, the agency staff which actually prepares an EIS may have been using it as a vehicle to encourage the final decision-maker to adopt a more environmentally sensitive approach to a particular project. However, such efforts, may prove entirely, or at least partially, fruitless.

293. See CEQ 1973 Guidelines, 40 C.F.R. § 1500.11(b) (1974) (stating that agencies “may at any time supplement” an EIS, “particularly when substantial changes are made in the proposed action, or significant new information becomes available concerning its environmental aspects”); *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 91-92 (2d Cir. 1975) (holding that use of a supplemental impact statement “is permissible . . . to consider changes in the proposed federal action”).

294. See, e.g., *Federal Highway Administration NEPA Regulations*, 23 C.F.R. § 771.15 (1975) (declaring that “[S]upplements will be necessary when substantial changes are made in the proposed action that will introduce a new or changed environmental effect of significance . . . or significant new information becomes available.”).

295. See *Essex County Preservation Ass’n v. Campbell*, 536 F.2d 956, 960-61 (1st Cir. 1976) (enforcing the NEPA regulations of the Federal Highway Administration).

296. See 43 Fed. Reg. 55,978, 55,995 (1978); Comment, *supra* note 291, at 116.

297. CEQ Regulations, 40 C.F.R. § 1502.9(c)(1)(i) (1987).

298. *Id.* § 1502.9(c)(1)(ii). An agency “may” also prepare a supplement whenever it would further the purposes of NEPA. *Id.* § 1502.9(c)(2).

final EIS.²⁹⁹ In addition to this binding regulatory requirement, the duty to prepare a supplement also arises from the language of NEPA itself. The Fifth Circuit, for example, has relied upon the fact that project changes, in and of themselves, may amount to "major Federal actions significantly affecting the quality of the human environment."³⁰⁰ Therefore, a supplemental EIS is triggered by reference to the same standard of "significance" which is employed to determine whether an EIS is needed in the first place.³⁰¹

Although CEQ and a few courts have used different terms to describe the scope of changes which will trigger a duty to supplement, the courts have generally equated "substantial" with "significant."³⁰² In any event, the agencies possess the initial responsibility to apply the test and decide whether a supplemental EIS should be written.³⁰³ Since such an administrative determination is similar to the threshold question of whether to prepare an EIS or not, the reviewing courts have generally employed the same standards of review.³⁰⁴ Thus, a number of circuits apply a reasonableness test to determine whether or not an agency has erred,³⁰⁵ while others apply the familiar arbitrary and capricious standard of review.³⁰⁶

299. *Id.* § 1502.9(c)(4).

300. *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. 1981) (quoting NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1982)). Most courts that have considered this matter, however, have found no need to go beyond the CEQ regulations in order to find a duty to supplement. *See, e.g., Enos v. Marsh*, 769 F.2d 1363, 1373 (9th Cir. 1985); *Massachusetts v. Watt*, 716 F.2d 946, 948 (1st Cir. 1983); *Friends of the River v. FERC*, 720 F.2d 93, 109 (D.C. Cir. 1983).

301. *See Environmental Defense Fund*, 651 F.2d at 991.

302. *See Sierra Club v. Froehke*, 630 F. Supp. 1215, 1229-30 (S.D. Tex. 1986) (essentially equating substantial with significant), *rev'd on other grounds*, 816 F.2d 205 (5th Cir. 1987); *National Indian Youth Council v. Andrus*, 501 F. Supp. 649, 662 (D.N.M. 1980) (holding that "substantial change" is consistent with "significant change"), *aff'd sub nom. National Indian Youth Council v. Watt*, 664 F.2d 220 (10th Cir. 1981). *But cf. Environmental Defense Fund*, 651 F.2d at 988 n.4 (suggesting that "substantial changes" could "be interpreted to impose a more rigorous standard" than "significant").

303. *See Friends of the River*, 720 F.2d at 108-09; *Sierra Club v. United States Army Corps of Eng'rs*, 701 F.2d 1011, 1037 (2d Cir. 1983); *Environmental Defense Fund*, 651 F.2d at 992.

304. *See, e.g., Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1024 (9th Cir. 1980); *Monarch Chemical Works v. Thone*, 604 F.2d 1083, 1087-88 (8th Cir. 1979).

305. *See Environmental Defense Fund*, 651 F.2d at 992; *Monarch Chemical Works*, 604 F.2d at 1087-88; *Warm Springs Dam Task Force*, 621 F.2d at 1024; *National Indian Youth Council*, 501 F. Supp. at 661 (citing *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1248-49 (10th Cir. 1973) (initial EIS case)). Although the First Circuit will reverse an agency's failure to prepare an EIS only if arbitrary or capricious, *see Grazing Fields Farm*, 626 F.2d at 1072, the Circuit has used the reasonableness test with regard to supplemental EISs, *see Watt*, 716 F.2d at 948.

306. *See United States Army Corps of Eng'rs*, 701 F.2d at 1037 (citing *Hanly v. Kleindienst*, 471 F.2d 823, 828-29 (2d Cir. 1972) (applying the arbitrary and capricious test to the initial determination not to prepare an EIS), *cert. denied*, 412 U.S. 908 (1973)); *Wisconsin v. Weinberger*, 745 F.2d 412, 417 (7th Cir. 1984).

This general conflict has been viewed by some as merely a matter of semantics, having little practical effect.³⁰⁷ The courts which have adopted the "reasonableness" standard, however, view it as a stringent test designed to ensure that this crucial agency decision is not "too well shielded from impartial review."³⁰⁸ On the other hand, courts choosing the arbitrary and capricious test have stressed that the use of a more deferential standard will permit the agencies to apply their expertise in a more flexible fashion.³⁰⁹

Regardless of which standard of review is used³¹⁰ and whether that choice really matters, a plaintiff must still try to show that a project change is significant or substantial enough to merit a supplemental EIS. Such efforts have met with rather mixed results³¹¹ and growing judicial hostility. The Fifth Circuit, for example, held that a fifty-percent increase in the land necessary for the construction of the Tennessee-Tombigbee Waterway was significant.³¹² By contrast, the Fifth Circuit held in the same case that the excavation and disposal of an additional nine million cubic yards of spoil was not significant because it represented only a 3.5% increase over originally projected figures.³¹³ The court thus apparently measured significance not by assessing the independent environmental impact of the project change, but rather by examining the change in relationship to the entire project.³¹⁴

307. See *Peshlakai v. Duncan*, 13 Env't Rep. Cas. (BNA) 1721, 1722 n.12 (D.D.C. 1979) (initial EIS case); cf. *Manasota-88, Inc. v. Thomas*, 799 F.2d 687, 692 n.8 (11th Cir. 1986) (initial EIS case) (stating that the differences between the two standards "are often difficult to discern"); *River Road Alliance, Inc. v. Corps of Eng'rs of United States Army*, 764 F.2d 445, 449 (7th Cir. 1985) (initial EIS case) (expressing doubt as to "how much, if any practical difference there is between 'abuse of discretion' and 'unreasonable'"), *cert. denied*, 475 U.S. 1055 (1986).

308. *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 466 (5th Cir. 1973) (initial EIS case). See also *National Indian Youth Council*, 501 F. Supp. at 667.

309. See *Hanly*, 471 F.2d at 829-30.

310. The Supreme Court recently refused to take advantage of two opportunities to resolve this conflict in the context of administrative decisions not to prepare an EIS in the first instance. See *River Road Alliance*, 475 U.S. 1055, 1055-56 (White, J., dissenting from denial of a petition for certiorari); *Gee v. Boyd*, 471 U.S. 1058, 1058-60 (1985) (White, J., joined by Brennan, J., and Marshall, J., dissenting from denial of a petition for certiorari).

311. See D. MANDELKER, *supra* note 9, at § 10:43 (Supp. 1988).

312. *Environmental Defense Fund*, 651 F.2d at 993 (overturning the Corps of Engineers' decision not to supplement as unreasonable). For another project change which a court has deemed significant, see *Association Concerned About Tomorrow, Inc. v. Dole*, 610 F. Supp. 1101, 1112-13 (N.D. Tex. 1985) (holding that the shift of a federally funded highway into public park land containing unique vegetation is significant).

313. *Environmental Defense Fund*, 651 F.2d at 996 and at n.15. A number of other courts have found various project modifications too minor to warrant supplementation. See, e.g., *Monarch Chemical Works*, 604 F.2d at 1088-91 (upholding an agency determination that the siting of a prison in a redevelopment area originally slated for industrial use was not a significant change); *National Indian Youth Council*, 501 F. Supp. at 662-63 (upholding an agency finding that the revision of a mining plan was not substantial).

314. Such a "relative view" was appropriate, according to the Fifth Circuit, because otherwise "projections for a large project like the [Tenn-Tom] would need to have an impossible kind of pinpoint accuracy in order to avoid the need for constant supplementation of the

Therefore, the larger the project is, the larger so-called "insignificant" changes can be.

The Seventh Circuit has clearly embraced this form of analysis. In *Wisconsin v. Weinberger*,³¹⁵ the court stated that a crucial "difference between an agency's decision whether to file an initial EIS and its decision whether to supplement an EIS is that the decision to supplement is made in light of an already existing, in-depth review of the likely environmental consequences"³¹⁶ Consequently, an agency must consider "the extent to which the new information presents a picture of the likely environmental consequences associated with the proposed action not envisioned by the original EIS."³¹⁷ The court then held that in the Seventh Circuit, the test for a supplemental EIS is whether the current project is "seriously different" from the original.³¹⁸

While the Fifth Circuit has expressly adopted the Seventh Circuit's approach,³¹⁹ it is unclear whether *Wisconsin v. Weinberger* is a harbinger of a general trend to view supplemental EIS cases with something of a jaundiced eye.³²⁰ In any case, a NEPA plaintiff may face yet another pitfall in the quest for a supplemental statement.

Since a citizen will often experience difficulty in determining whether a project has been modified until such changes appear in concrete form, many projects will be completed or nearly completed before suit can be filed.³²¹

EIS." *Environmental Defense Fund*, 651 F.2d at 996 n.15. The court, however, did not apply this "relative" or comparative form of analysis while evaluating two other significant departures from the original design for the Tenn-Tom. See *id.* at 993-95 (holding that the flooding of an additional 5,000 acres and the waterlogging of an additional 50,000 acres were significant changes); *id.* at 995 (holding that the isolation of 21 miles of the Tombigbee River due to new cutoffs of the river's channel was significant).

For a general discussion of *Environmental Defense Fund*, see Comment, *Supplemental EIS Mandated for Tennessee-Tombigbee Waterway*, 11 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,213 (1981).

315. 745 F.2d 412 (7th Cir. 1984).

316. *Id.* at 418.

317. *Id.* (emphasis added).

318. *Id.* (emphasis in original) (finding the Navy's decision not to produce a supplemental EIS neither arbitrary nor capricious). Although the Seventh Circuit was concerned in this case specifically about the significance of new information rather than project modifications, the court's analysis is sufficiently broad to apply to cases involving project changes as well.

319. See *Louisiana Wildlife Fed'n v. York*, 761 F.2d 1044, 1051 (5th Cir. 1985) (holding unreasonable the Army Corps of Engineers' refusal to supplement an EIS in light of new information).

320. See D. MANDELKER, *supra* note 9, at § 10:43 (Supp. 1988) (characterizing *Weinberger* as adopting a "restrictive view" which "is not yet the definitive word" on the subject).

321. See *supra* text accompanying notes 287-88. *Ogunquit Village*, 553 F.2d 243, provides an excellent illustration of this problem.

The Village of Ogunquit, Maine, had long thrived on tourists who came to enjoy the white sand dunes which stretched along that portion of the Maine coast. Unfortunately, the dunes began to erode, prompting the village to seek assistance from the federal Soil Conservation Service. The Service, in turn, proposed to rebuild the dunes and prepared an EIS. See *id.* at

If so, a court may well deny post-completion relief, finding the suit moot³²² or barred by laches.³²³

Even if a plaintiff could surmount the obstacles of discovering a project change before it is too late and convincing a court that an agency erred in deeming a change insignificant, victory may prove hollow. A supplemental EIS will not necessarily lead to a different, more environmentally sensitive decision. Indeed, it is not unlikely that the affected agency will produce a supplement which is just more closely attuned to the agency's prior decision. In such a case, the supplement may become a mere post hoc rationalization designed to justify what amounts to a *fait accompli*.³²⁴ The preparation of a supplemental impact statement, nevertheless, will provide EPA and other commenting federal agencies with an opportunity to refer proposed actions which now, more accurately depicted in the supplement, appear environmentally unsatisfactory. The route by which such a referral becomes possible, however, is tremendously circuitous, fraught with delay, and wasteful of limited public resources. Moreover, only a relative handful of projects will ever result in court-ordered supplementation.³²⁵ Consequently, a more

243-44. Although the EIS implied that white quartz sand would be used during the restoration process, *see id.* at 245, the Service found it necessary to use substantial amounts of coarse yellow sand and gravel. This mixture was dumped in December of 1974, and the project was completely wrapped up within a month. By the time the village complained, it was too late; the damage had been done. *See id.* at 244. Instead of the famous white sand dunes, "the villagers found what to many was an ugly yellow bunker." *Id.*

Faced with the dilemma of a completed project and an EIS which now appeared inadequate, and fearful of an avalanche of retrospective NEPA litigation, the First Circuit held that post-completion relief was unavailable unless bad faith could be demonstrated. *Id.* at 245-46. For criticism of the First Circuit's approach, see Note, *supra* note 265; Note, Ogunquit Village Corp. v. Davis and Judicial Relief under the National Environmental Policy Act: The Completed Project Problem, 64 VA. L. REV. 629 (1978).

322. *See supra* note 289 and accompanying text. A supplemental EIS could, nevertheless, identify various inexpensive ways to mitigate the harm caused by some project changes. *See* Note, *supra* note 265, at 234-35; Note, *supra* note 321, at 639.

323. *See supra* note 290 and accompanying text.

324. Many plaintiffs, on the other hand, may be quite content to delay the completion of a project in hopes that the agency will grow frustrated and drop it, that Congress will eventually withdraw funding, or that a new administration will choose to discontinue that particular project. Delay, however, does not invariably flow from a court order requiring the supplementation of an EIS.

A number of courts have chosen to balance the competing public interests in deciding whether to enjoin further construction pending completion of a supplement. *See Watt*, 716 F.2d at 952-53; *Weinberger*, 745 F.2d at 425-28; *see generally* *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982) (holding that a court has discretion in determining whether it will fashion injunctive relief to cure a Clean Water Act violation). *But see* *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1250 (9th Cir. 1984) (holding that "[I]rreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action").

325. The value of voluntary compliance with the supplementation requirements found in the CEQ regulations is not intended to be gainsaid. In fact, most agencies probably try to comply in more instances than not. This article, however, is primarily concerned with the absence of an effective external safeguard that will serve to ensure that agencies of the executive branch do not ignore the environmental harm that their actual decisions may cause.

direct and comprehensive mechanism must be employed if agencies are to be held accountable for the environmental consequences of their decisions and subsequent actions.

IV. A NEW APPROACH TO EXECUTIVE BRANCH OVERSIGHT

Congress confronted a unique problem in drafting NEPA. Rather than crafting a piece of legislation dealing with a specific regulatory subject, such as air quality or water pollution control, Congress attempted to reorient the priorities of the entire executive branch in order to protect the environment. Consequently, NEPA's statement of substantive policy is exceedingly general,³²⁶ applying as it must to thousands of diverse situations arising in dozens of different agencies. Congress, moreover, had to take into account a multitude of existing, sometimes countervailing, policies which also serve vital national interests. Section 101 thus provides that environmental protection is not necessarily the controlling factor in federal decisionmaking. Instead, agencies are instructed "to use all practicable means, consistent with other essential considerations of national policy" to carry out NEPA's substantive mandate to enhance and preserve the quality of the human environment.³²⁷

Statements of policy, however, are generally ineffective tools for achieving administrative reform.³²⁸ Even less effective would be a statement, necessarily broad, which contains language authorizing federal decisionmakers to balance a number of competing policy concerns—one of which is potentially at odds with the historic missions of many developmentally-minded agencies. It is fortunate, therefore, that Congress strove over a number of months to construct a cohesive body of procedural and structural reforms³²⁹ designed to ensure the implementation of the policy goals established by NEPA.

The primary procedural vehicle which Congress seized upon to place principle in action was the EIS. Through this device, Congress tried to guarantee that agencies would at least examine the environmental harm that major federal actions would cause. So informed, it was Congress' hope that agencies would modify their activities to avoid unnecessary environmental damage.³³⁰ Congress, nevertheless, was prudent enough not to rely totally upon this procedural device as a means to achieve substantive reform. After all, merely forcing an agency to think differently about a problem will not

326. See *supra* text accompanying note 4.

327. NEPA § 101(b), 42 U.S.C. § 4331(b) (1982).

328. See *supra* note 5.

329. See McGarity, *supra* note 213, at 257 (using the narrower term "structural regulatory reform" to describe attempts to alter "agency decisionmaking structures so that different institutional actors play greater or lesser roles" (emphasis in original)).

330. See *supra* text accompanying notes 71-76, 85-87, 122-26.

necessarily lead that agency to change its customary institutional behavior. Congress thus worked hard, albeit in a series of fits and starts, to create a structural setting in which other executive agencies—more environmentally concerned agencies—could participate in the environmental assessment and decisionmaking processes.

NEPA's creation of a high-level CEQ was a significant step in laying the foundation for this kind of structural reform. CEQ, however, was not originally conceived as a vigorous, hands-on advocate for the goals expressed in NEPA. In fact, Congress, in enacting NEPA, envisioned CEQ's oversight role as rather minimal. Despite the fact that a number of Representatives believed that CEQ could serve as a watchdog for environmental concerns within the administration,³³¹ the Senate Report, and the subsequent statements by the bill's two primary sponsors, indicate that CEQ's oversight function was limited to reviewing the general trend of federal activities in order to advise the President on matters of broad environmental concern.³³²

NEPA, however, did give environmental agencies a voice in the impact assessment process. This was accomplished by revising section 102(2)(C) in two ways. In addition to changing the requirement for a "finding" to the now familiar requirement of a "detailed statement,"³³³ Congress directed action agencies to request comments on their detailed statements from those agencies with environmental expertise or jurisdiction.³³⁴ Although Senator Muskie exaggerated when he claimed that these revisions would place the ultimate authority to determine environmental effects in the hands of environmental agencies,³³⁵ Congress did deprive action agencies of the ability to make environmental findings in a virtual vacuum, insulated from external advice and scrutiny. The final version of section 102(2)(C), therefore, opened up the assessment process and created a structural check upon any agency inclined to ignore or minimize significant environmental problems during the preparation of an impact statement.

Within the course of a year, Congress found that this check was not totally adequate. The voice of environmental agencies had proved neither

331. See *supra* note 105 and accompanying text. Even Senator Jackson thought that the location of CEQ in the Executive Office of the President would provide an effective check on the views of the mission-oriented agencies. See *supra* text accompanying note 81. His later statements indicate, however, that this check would be limited to overseeing the "general direction" of federal programs and offering broad policy advice. See *supra* note 128.

332. See *supra* text accompanying notes 88-90; *supra* note 128 (views of Sen. Jackson and Rep. Dingell). The responsibility for reviewing day-to-day decisionmaking, as well as the resolution of inter-agency disputes, therefore, was relegated by default to the Bureau of the Budget, a cabinet-level council, or the President. See *supra* note 91 and accompanying text.

333. See *supra* notes 113-18, 130 and accompanying text.

334. See *id.* (Sen. Muskie commented, "The requirement that . . . comments accompany any such report would place the environmental control responsibility where it should be." 115 CONG. REC. 29,053 (1969).

335. See *supra* text accompanying note 131.

loud enough nor effective enough to inform the assessment process and thereby influence agency decisionmaking.³³⁶ Congress, consequently, took strong action to amplify executive branch oversight when it enacted section 309 of the Clean Air Act Amendments of 1970. Section 309 not only compels EPA to monitor and comment on the merits of all major federal actions having significant environmental implications,³³⁷ it provides EPA with the authority to refer any such "action" which is environmentally "unsatisfactory" to a higher authority—CEQ—for review and possible resolution.³³⁸ Such a brief description of section 309, however, fails to convey the sweeping form of executive branch oversight for which this short but remarkable provision calls.

The original Senate version of section 309 would have focused EPA review merely upon the environmental merits of impact statements and the proposed actions such statements describe.³³⁹ The conference, however, changed this language, instructing EPA instead to review and comment on the substantive merits of "any major Federal agency action" subject to the required preparation of an impact statement.³⁴⁰ By adopting the conference version of section 309, Congress must have intended to broaden the scope of EPA's oversight authority to include the environmental rectitude of final agency action, not just the adequacy of an impact statement or even the environmental quality of a proposed action described in an EIS.³⁴¹ Likewise,

336. See *supra* text accompanying notes 146-49. See also *supra* notes 170-72 and accompanying text.

337. See Clean Air Act § 309(a), 42 U.S.C. § 7609(a) (1982).

338. *Id.* § 309(b), 42 U.S.C. § 7609(b).

339. See *supra* text accompanying notes 141-48 and note 149 and accompanying text..

340. See H.R. CONF. REP. NO. 1783, 91st Cong., 2d Sess., 36 (1970) (§ 309(a)), *reprinted in* 1 LEGISLATIVE HISTORY 1970, *supra* note 20, at 186. See also *supra* text accompanying notes 162-63, 178 and note 165 and accompanying text.

341. See *supra* notes 173-75 (comments of Sen. Muskie on the policy underlying § 309). If Congress had wished to expressly limit EPA review under § 309 to proposed actions for which an EIS must be prepared, it certainly knew how to do so. For instance, § 309 specifically limits EPA review of agency regulations to "proposed regulations." Clean Air Act § 309(a), 42 U.S.C. § 7609(a). Congress, therefore, apparently chose to extend EPA review beyond the narrow confines of proposals which trigger an EIS or proposals which are found in the text of an EIS.

A number of commentators, however, have assumed that § 309 NEPA review is limited to the merits of proposed action. See, e.g., Anderson, *supra* note 24, at 268; Healy, *supra* note 149, at 50,080 n.62. This view, however, appears to be based, at least in part, upon a mistaken reading of the provision's legislative history. Both Healy and Anderson state that the Senate bill had restricted EPA review to the procedural adequacy of impact statements. See *supra* note 149. Therefore, they see the significance of the conference action as involving a shift from a procedural review to a substantive evaluation of an EIS. See Anderson, *supra* note 24, at 268; Healy, *supra* note 149, at 50,080 n.62. This explanation thus fails to account for the action of the conference if, as this article argues, the Senate bill had already mandated substantive scrutiny of environmental impact statements.

One could, nevertheless, make a plausible argument for limiting § 309 review to the merits of proposed agency action. After all, that section requires EPA to review and comment on

and with identical effect, Congress accepted the conference language requiring EPA to refer to CEQ any such action found wanting on environmental grounds.³⁴²

Congress was, therefore, determined to create a strong day-to-day supervisor of the manner in which federal agencies comply with the requirements of the NEPA process and the Act's underlying policy goals. In fact, the legislative history indicates that EPA was expected to perform its important, though politically unenviable, task by vigorously advocating the case against those federal activities that present the risk of untoward environmental consequences.³⁴³ Congress also enhanced EPA's bargaining position within the administration by recognizing the unique role that CEQ could play if EPA found itself at an impasse with another agency. In such a case, EPA is not only empowered but expected to refer the matter to CEQ if the action is unsatisfactory from an environmental standpoint.³⁴⁴ CEQ, in turn, can bring to bear the not inconsiderable weight and prestige that its position in the Executive Office of the President can command.³⁴⁵

The full potential of section 309, however, has yet to be realized. Conceived of as a comprehensive mechanism for achieving structural reform in federal decisionmaking, it has suffered the fate of a relatively obscure piece of legislation. CEQ, of course, has acknowledged that the purpose of the EIS is to produce better decisions.³⁴⁶ To this end, CEQ requires agencies to produce a ROD which indicates to some extent how an impact statement was used in the decisionmaking process.³⁴⁷ CEQ also directs agencies to abide by the mitigation measures and other conditions found in this decision document.³⁴⁸ However, CEQ has failed to establish an oversight mechanism

"any major Federal agency action . . . to which section [102(2)(C) of NEPA] applies," Clean Air Act § 309(a), 42 U.S.C. § 7609(a), and § 102(2)(C) applies, in a literal sense, to "proposals" for "major Federal actions" having significant environmental effects. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1982). Such a reading of § 309, however, is not the most reasonable interpretation of Congress' intent as revealed by the action of the conference and the words of Senator Muskie. Moreover, the ultimate action to which § 102(2)(C) applies is final agency action. That is the action which the impact statement is designed to inform, *see Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1114-15 (D.C. Cir. 1971), and that is the action which may not proceed until an impact statement has been prepared, CEQ Regulations, 40 C.F.R. §§ 1506.1, 1506.11(b) (1987); CEQ Regulations, 40 C.F.R. § 1506.11(b) (1987).

342. *See supra* text accompanying note 164.

343. *See supra* text accompanying notes 173-75. Professor William H. Rodgers, Jr. has aptly described § 309 as giving EPA "a roving commission to review [federal activities]." W. RODGERS, *supra* note 160, at 219. It "makes EPA 'a general environmental busybody and gossip'" with a duty to question "unsuitable environmental adventures." *Id.* at 709.

344. *See* Clean Air Act § 309(b), 42 U.S.C. § 7609(b) (stating that EPA "shall" refer such "unsatisfactory" actions to CEQ).

345. *See supra* text accompanying notes 199-201, 248-56.

346. *See supra* text accompanying notes 216-18, and note 228 and accompanying text.

347. *See supra* text accompanying notes 219-26.

348. *See supra* note 227 and accompanying text.

which would ensure that these procedural requirements serve their intended purpose of encouraging better decisions and actions.

Under CEQ's leadership, the entire referral process has been confined to disputes concerning the environmental assessment process.³⁴⁹ While CEQ does permit referrals based on the merits of the proposed actions found in EISs,³⁵⁰ both the Council's regulations³⁵¹ and experience³⁵² demonstrate that an agency can modify or even ignore that proposal when it comes to final decisionmaking. CEQ, however, does not appear to be authorized to prohibit referrals emanating from EPA as to the substantive merits of agency decisions or actions. Section 309 authorizes such referrals,³⁵³ and Executive Order 11,991 certainly ordered CEQ to promulgate regulations implementing section 309.³⁵⁴ Nevertheless, CEQ has in effect prohibited the filing of such referrals.³⁵⁵

CEQ has not articulated any rationale for its truncated approach to entertaining environmental referrals from EPA.³⁵⁶ EPA, on the other hand, has long recognized that its oversight role does not necessarily end with the filing of an impact statement.³⁵⁷ The agency's practice in this regard, however, suffers from both internal and external constraints. Rather than broadly examining the environmental merits of federal decisionmaking and the actions that follow, EPA's post-EIS procedures have concentrated upon the relatively narrow question of whether an agency has complied with its mitigation agreement, if any, with EPA.³⁵⁸ Furthermore, even within this limited context, EPA's ability to influence another agency is severely hampered because EPA lacks the formal recourse of a post-EIS referral to CEQ.³⁵⁹

Neither CEQ nor EPA, therefore, have taken all of the steps necessary to tie the procedural requirements of NEPA to its ultimate goal of better decisionmaking. While section 309 does not authorize either EPA or CEQ to veto another agency's final decision, it does provide for a broadening of the traditional decisionmaking processes of the federal government to allow EPA and, in certain instances, CEQ to inject their thoughts on how agencies can better serve national environmental policy. Such a structural reform was altogether appropriate since NEPA's policy does not demand precise

349. See *supra* notes 235-37, 257 and accompanying text.

350. See *supra* text accompanying notes 232-33.

351. See *supra* notes 219-26, 258 and accompanying text.

352. See *supra* notes 280-81 and accompanying text.

353. See *supra* text accompanying notes 162-65, 173-78, 337-43.

354. See *supra* note 214.

355. See *supra* note 257.

356. See Preamble to CEQ Regulations, *supra* note 35; CEQ Forty Most Asked Questions, *supra* note 34.

357. See *supra* text accompanying notes 211-12, 261-64.

358. See *supra* notes 261-64 and accompanying text.

359. See *supra* text accompanying notes 257-58.

results. Given the flexibility and generality with which NEPA's policy is stated, the Act's goal of more environmentally sensitive decisionmaking could easily be subordinated to the more immediate goals of mission-oriented agencies.

At the same time, however, Congress did not intend to dislodge the discretion that agencies have to make final decisions. NEPA essentially counsels prudence, asking an agency to balance environmental concerns with other essential considerations of national policy. The judiciary is thus ill-equipped and likely not empowered to supervise this aspect of the decisionmaking process. In contrast, Congress did tap EPA to be the environmental gadfly of the federal government. In this role, EPA can—indeed must—criticize agency decisions or actions which fail to comport with the environmental values recognized in NEPA. If the informal give-and-take between EPA and another agency does not resolve a particular dispute, EPA then must, if the action appears unsatisfactory, refer the question to CEQ.

Congress was wise to provide for CEQ review and intervention in such situations. As the President's direct representative, CEQ possesses the unique ability not only to mediate serious policy disputes, but to influence agency decisionmaking. In fact, CEQ has direct access, at least theoretically, to both the President and his immediate staff. Aside from Congress itself, CEQ may well be the most appropriate institution to assist in reconciling conflicts between NEPA and other statutory missions. Moreover, the publicity generated by formal referrals may, on occasion, prompt direct congressional intervention. In those instances, Congress itself can decide upon the course of action which will best serve the national interest.

The implementation of this comprehensive structural reform still awaits administrative action. CEQ thus should amend its NEPA regulations to require agencies to provide EPA with copies of all RODs. Such decision documents, moreover, should delineate the agency's decision in sufficient detail to allow EPA to appraise its merits from an environmental standpoint.³⁶⁰ EPA should also be given an appropriate period of time in which to review these documents, consult with the originating agencies, and, if necessary, refer a decision to CEQ.

During this review period, agencies should be prohibited from taking any action, such as licensing or construction activities which would compromise an agency's ability to alter its decision. Such a timing provision will likely be criticized because it extends the NEPA review process and will result in some additional delay. This delay, however, is a small price to pay for an institutional arrangement designed to ensure that final agency action is

360. In the event the terms of a decision are adequately described in the impact statement itself, an agency should be free to incorporate the relevant portions of the EIS by reference.

indeed geared to what was learned during the preparation of an EIS. To minimize any possible disruption to agency programs, CEQ should require relatively prompt review by EPA and also provide for the expeditious resolution of any referrals which EPA might file.

Decisions, however, no matter how wise they may be, must still be implemented. Agencies, therefore, should be directed to undertake a reasonable self-monitoring program which will identify the extent to which the agency's action has been faithful to the terms of the ROD. The resulting information, furthermore, must be made available to EPA for its review and comment. In the event that the agency's actions deviate from the ROD and as a result seriously compromise environmental values, EPA should be authorized to refer the matter to CEQ for further review.

The efficacy of implementation referrals will depend on whether a particular deficiency or omission can be corrected. The earlier a problem surfaces, of course, the more likely a practical remedy can be found. However, certain omissions can be corrected even after significant aspects of a project have been completed. While the construction of a dam cannot be undone, the acquisition of wetlands or wildlife habitat can still be undertaken. If funding is the problem, a referral to the Executive Office of the President may well spur the administration to seek whatever additional funding may be necessary to implement necessary mitigation.

EPA should also take steps to complement these regulatory changes. The agency should revise its policy and procedures to guarantee that appropriate review and comment will take place during the various stages of the post-EIS oversight process. EPA should also define its approach to consultation and negotiation with the relevant agencies prior to any referral. In addition, EPA should set forth, in general, the circumstances under which it will pursue a referral to CEQ.

None of these reforms, however, will succeed unless CEQ and EPA request and receive additional funding and staff to initiate this expanded form of environmental oversight. The prospect of such a request from the Reagan administration was dismal. During the Reagan years, in fact, the entire professional staff at CEQ dwindled to five persons.³⁶¹ The current administration, on the other hand, will have an opportunity to establish a renewed commitment to environmental quality. If it wishes to pursue this commitment through vigorous executive branch scrutiny of the way in which

361. See *Budget Hearings 1988*, *supra* note 242, at 705 (setting forth the actual staffing figures for fiscal year 1987). The entire staff (professional as well as clerical, but excluding Council members) has fallen from a total of 49 in 1979, see *Department of Housing and Urban Development—Independent Agencies Appropriations for 1981, Pt. 6: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 96th Cong., 2d Sess. 1007 (1980) (setting forth average employment for fiscal year 1979), to nine in 1987, *Budget Hearings 1988*, *supra* note 242, at 705. See generally *National Journal*, May 18, 1985, at 1103 (describing CEQ as "an early target of the Reagan budget ax and personnel cuts").

the federal bureaucracy implements NEPA, it will seek both the necessary funds and personnel from Congress. The question will then be back in the forum from whence section 309 sprang.

CONCLUSION

NEPA is an ambitious statute. It cautions prudence and wisdom in the way federal agencies approach actions which may compromise the integrity of the environment. After calling upon agencies to fully inform themselves about the environmental consequences of proposed actions, the Act instructs agencies to craft decisions which are as responsive as possible to the demands of environmental quality. NEPA, consequently, creates a comprehensive, but flexible mechanism for achieving its goal of more enlightened federal decisionmaking. Rather than mandating specific answers to specific problems, NEPA relies upon the efforts of every federal agency to weigh competing policy demands in an environmentally informed and sensitive fashion.

By placing the primary responsibility for implementing NEPA in the hands of mission-oriented agencies, Congress recognized that the most effective and practical avenue for influencing agency action lies in the internalization of the values expressed in NEPA. Congress, however, was also perceptive enough to realize that not all of these agencies would be especially receptive to such a new responsibility. This realization led Congress to devise a number of structural safeguards designed to ensure that agencies make informed choices which reflect the high objectives of the Act.

The first such structural safeguard is found in the text of NEPA itself. It invites agencies which possess special environmental competence to participate in the impact assessment process. Through this participation, action agencies receive advice and criticism on both the technical adequacy of impact statements and the substantive merits of proposed actions. CEQ, moreover, has provided an additional safeguard in the event these agencies find themselves at loggerheads over substantive matters. If the action proposed in a final statement is found environmentally wanting, an environmental agency may refer the question to CEQ for high-level executive branch review.

The NEPA process, however, does not end with preparation of a satisfactory impact statement. NEPA requires more than just the production of paperwork, even excellent paperwork. It requires an action agency to come to terms with what was learned in an EIS, to balance competing policy interests, and to make a decision which, to the extent possible, furthers the goal of environmental protection. While Congress never preempted the decisionmaking authority of action agencies, it did establish an additional structure—section 309 of the Clean Air Act—that would subject such decisions to executive branch oversight.

Through section 309, Congress directed the EPA to maintain constant watch over those actions of its sister agencies which present a risk of significant environmental harm. EPA's obligations under section 309, therefore, extend beyond the mere monitoring of the actions proposed in final impact statements. In fact, EPA's charge extends to the environmental merits of final agency decisions. Congress thus envisioned a broad oversight role for EPA, a role strengthened by the availability of a referral to CEQ in the event an agency decision appears to be environmentally unsatisfactory.

The full potential of this reform, however, remains untapped. EPA largely limits its oversight function to the assessment phase of the NEPA process. And CEQ, for its part, refuses to entertain referrals which challenge the substantive merits of final agency decisions. Hence, no real structural safeguard currently exists that would encourage agencies to either take their impact statements seriously or adhere to the policy objectives of NEPA during the formulation of final decisions.

Contrary to congressional expectations, therefore, agencies are effectively insulated from external scrutiny during the most critical phase of the NEPA process. Such insulation does nothing to promote the internalization of environmental values or responsibility. Such insulation, moreover, makes it all too easy for agencies, even well-intentioned agencies, to succumb to the ever-present temptation to subordinate the aspiring goals of NEPA to more parochial concerns. Fortunately, Congress has already devised a structure to pierce this insulation. All that remains is for CEQ and EPA to summon the political courage and will to implement that structure and for Congress to appropriate the necessary funds. If they do, a significant step will have been taken toward ensuring that the promise of NEPA is not lost amid the pressures and complexities of modern administrative decisionmaking.

